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# GENERAL ABRIDGMENT

OF

# Law and Equity,

ALPHABETICALLY DIGESTED UNDER PROPER TITLES;

WITH NOTES AND REFERENCES

BY CHARLES VINER, Esq. Founder of the vinerian lecture in the university of oxford.

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# TABLE

#### OF THE

# Several TITLES, with their Divisions and Subdivisions.

	-
Ebidence.	Page
IN ITNESSES.	
VV What Persons may be A.	1
Feme in Case of her Baron, or Baron in Case of his	
Feme B.	2
Persons interested by Accident C.	.5
As Executors, Trustees, Guardians, &c. D.	5
Or by Kindred E.	.8
Interested Persons F.	8
Members of Corporation, &c G.	15
Judges, Jurymen, &c H.	20
Parties I.	21
In Case of Necessity. • K.	26
To Frauds L.	27
Difabled.	
By Crimes. M.	27
Of a lower Sort. • O.	29
Not concurring with the Law P.	30
From or at what Time Q.	30
By Interest.	
Enabled by some After-Act R.	31
By Act of the other Party. S.	32
By Suspicion of Fraud T.	32
One Offender admitted against another U.	33
Demeanor.	33
How they may affift themselves in giving their Evi-	
dence W.	33
Non-Appearance. Punishment for it X.	34
Refusing to be sworn Y.	
Demeanor of Counfel as to Witnesses. Y. 2	. 35
Demonder of Countries as to Tritheness	um-

Buidence.		Page
Number.		
How many are necessary to prove a Thing,	and	
what.	Z.	30
Objections to the Credibility of a Witness in that		
tictlar Caufe.	A. a.	37
What Persons in certain Cases shall not be con	В. а.	-0
pelled to give Evidence.  What Perfons shall not be Witnesses unless sworn.	700.0.000	38
In what Cases, and how.	C. a.	20
Demeanor of and to Witnesses in general.	C. a.	39
How it must, or may be.	D. a.	39
Witnesses. Who. In criminal Matters.	2	39
Persons injured.	E. a.	40
Particeps Criminis.	F. a.	40
Difabled by Crime.		7-
Enabled by Pardon, or some After-Act.	G. a.	41
Process against Witnesses. And Punishment of n		7
appearing	H. a.	43
Joined to the Inquest, in what Cases	1. a.	46
Privileged from Arrefts	K. a.	46
Not to be enforced to give Evidence again		
themselves	L. a. 2.	47
Evidence by Jurors.	I. a. 3.	47
Examination of Witnesses, to what, and how.	M. a.	47
On a Voire Dire.	M. a. 2.	48
De Bene Effe.	M. a. 3.	49
Of whom it may be.	5.	77
Plaintiffs or Defendants.	M a. 4.	50
Of Evidence in general.	N. a.	
Examination of Witnesses after Publication.	P. a.	52
Re-examination. In what Cases.	P. a. 2.	53
Prefumptive Evidence.		54
What shall be admitted by Reason of Length of	f	
Time; &c.	Q. a.	56
	Q. 2. 2.	
Evidence sufficient, good by Intendment. Supplied. In Case of Necessity.	R. a.	57
		59
Order of giving Evidence.	S. a.	60
Who must begin and end.  Given at what Time.	T. a.	604
What must be produced in Evidence. As Pa		000
pers. Deeds, &c.	U. a.	61
Good by Confent	X. a.	62
Variance between the Evidence and the Decla		02
	Y. a.	63
What must be pleaded, or may be given in Evi-		~3
	Z. a.	69
What Things may be given in Evidence, and o		9
what I mings may be given in Evidence, and what.		
Acts of Courts.	A. b.	81
Acts of Parliament	A. b. 1.	81
Admission.	A. b. 2.	82
Affidavit:	A. b. 3.	83
Almanack.	A. b. 4.	83
Annatiack,	Anti	

Chidence.	Page
Antient Deeds.	
Antient Tables of Duties.	
Apprentices Indentures.	
Appropriations.	
Arreft.	A.b. 9. 85
Affault.	A. b. 10. 85
Attorney's Bill.	A. b. 11. 86
Belief.	A. b. 12. 86
Beyond Sea. Things done there,	A. b. 13. 86
Bill and Answer in Chancery.	A. b. 14. 88
Books.	A. b. 15. 88
Certificates.	A. b. 16. 91
Chancery. Proceedings there	A. b. 17. 92
Chirograph of a Fine.	A. b. 18. 94
Circumstances.	A. b. 19. 94
Collateral Warranty.	A. b. 20. 94
Comparison of Hands.	A. b. 21. 95
Condemnation of Goods seized.	A. b. 22. 95
Confession of one against another.	A. b. 23. 95
Confpiracy.	A. b. 24. 96
Constat.	A. b. 25. 97
Copies.	A. b. 26. 97
Counterparts	A. b. 27. 104
Court-Rolls	A. b. 28. 105
Decrees.	A. b. 29. 106
Deeds; though the Witnesses not proved dead	1
or beyond Sea.	A. b. 30. 106
Depositions	A. b. 31. 107
Examination.	A. b. 32, 113
Exemplification. Of what.	A. b. 33. 114
Fine.	A. b. 34. 117
Foreign Letters in a strange Language.	A. b. 35. 117
Goldsmith's Note.	A. b. 36. 117
Guardian's Answer in Chancery.	A. b. 37. 117
Hearfay	A. b. 38. 118
Herald's Books.	A. b. 39 119
History.	A. b. 40. 119
Indorfement	A. b. 41. 120
Inquest of Office.	A. b. 42. 120
Inrollments of Deeds.	A. b. 43. 121
Infpeximus	A. b. 44. 121
Inventory.	A. b. 45. 123
Jointenancy.	A. b. 46. 122
Journal. •	A. b. 47. 122
Minutes of Proceedings in Courts	A. b. 48. 122
In what Cases a Negative must be proved, and	
what shall be Proof thereof.	A. b. 49. 122
Nonfuit.	A, b. 50. 123
Notary Publick's Certificate	A. b. 51. 123
Office found.	A. b. 52. 123
Parliament Rolls.	A. b. 53. 123
Parol Evidence to Writing -	A. b. 54. 124
2 2	Pre-

Presentment of the Forresters.	AL	Page
		55. 124
Prefumption. Length of Time.		56. 124
Probate.		57. 126
Proceedings in Courts Spiritual.		58. 128
Proclamation.		59. 129
Receipt.		
Record.		61. 129
Recovery. In other Courts than those of	A. D. (	52. 130
Westminster.	AL	63. 131
Register-Book.		64. 131
Rent. Discharge thereof.	Ab	55. 131
Rentals.	A b	66. 131
Reputation common.		57. 132
Rule of Court.		68. 132
Seals of Courts.		
Sentence In the Exchequer, as to Goods	41. D.	69. 132
forfeited.	A. h.	70. 132
Signet Manual of the King.		
Similitude of Hands.	A. b.	71. 132
Things done or fworn at another Trial.	A. b.	72. 132
Torn Papers, Books, &c.	A. b.	74. 136
Transfer-Books of a Company.	A. b.	
Verdict	A. b.	
Water Courses. Diverting them.	A h	76. 136
Year-Books.	A. b.	8 128
What Things may be given in Evidence.	21. 0. 7	8. 138
Variance in Time or Place, &c	B. b.	138
Proof. Good or not, though it comes not fully		- 50
up to the Suggestion.	C. b.	139
At what Time it must be.	D. b.	144
In what Cases new Evidence shall be given.	E. b.	144
What Evidence the Parties may enforce the	unchia	***
Plaintiff, or others to produce; as Court-		
Rolls, Books of Account, Church-Books,		
&c	F. b.	145
In what Cases a special Matter may be given in	A STATE OF	13
Evidence.	H. b.	148
In Account ibid. Fo		151
In Annuity.	ibid.	151
In Appeal ibid. Fo	ol. 151	150
As to Affets	ibid.	150
In Bastardy.	ibid.	150
As to Common.	ibid.	150
In Debt.	ibid.	150
Against Corporation ibid. Fo		152
Against Executors.	ibid.	152
In Detinue.	ibid.	152
In Dower.	ibid.	152
False Imprisonment ibid. Fo	1. 153	153
Grant.	ibid.	153
Hors de son Fee. · ibid. Fo	1. 154	154
		Main-

# With their Divisions and Subdivisions.

Bbidence.		Page
Maintenance	ibid-	154
Non est Factum.	ibid.	154
Rent. Affife.	ibid.	154
	Fol. 155	155
Rent. Avowry.	ibid.	155
Rent. Replevin.	ibid.	
Statutes Penal.	ibid.	155
Tehure.	ibid.	155
	ibid.	155
Trefpass of Battery.  Of Closes, &c. broken, &c. ibid.		155
	Fol. 156	156
Of Goods carried away. ibid.	Fol. 157	157
	ibid.	157
What may be given in Evidence in Mitigation		0
Damages.	I. b.	158
In Aggravation of Damages.	К. ь.	160
Repugnant to the Iffue.	L.b.	160
Admitted by what Plea or Action.	M. b.	161
Of what the Jury may or must take notice.  Evidence.	N. b.	163
What may be given on the General Issue u		
Not Guilty. And what may be given in I		
dence in the following Cases.	О. в.	1. 163
Affault and Battery.	О. ь.	
As to Attachment of Goods.	O. b.	3. 164
Attaint.	0. b.	3. 164
Detinue.		4. 164
In Ejectment.		5. 164
False Imprisonment by Peace-Officers.	О. Ь.	6. 165
As to False Return of Writs.	O. b.	7. 165
- As to Highways		8. 166
Maintenance.		9. 166
Parco Fracto.		10. 167
Refcous.		11. 167
Trespass.		12. 167
Trover.		14. 169
Warren.		15. 170
Wafte.		16. 170
Writ of Right.	O. b.	17. 171
For or against what Persons having Relation	1 to	
others.		
Acceffory.	P. b.	1. 171
Bail.	P. b.	
Bailiff and Receiver.	P. b.	3. 171
Baron and Feme.	P. b.	4. 171
Carriers.		5. 172
Custom-house Officers.	P. b.	6. 173
Executors and Administrators.	P. b.	7. 173
Inn-keepers.	P. b.	8. 174
Landlord and Tenant.	P. b.	9. 174
Master and Servant.	P. b. 1	0. 175
Merchant and Infurer.	P. b. 1	11. 175
Partners.	P. b. 1	12. 176
		Sheriff.

Ebidence.		Page
Sheriff.		P. b. 13. 176
Strangers.		P. b. 14. 176
Succeffors.	•	P. b. 15. 176
Traders.	:- P.A.	P. b. 16. 177
What must be given in Eviden	nce in Keipe	
the Plea.		Q. b. 1. 177
Account.		0.1
Non Cepit.		Q.b. 2. 177
Contract.	•	Q.b. 3. 178
Non Infregit Conventionem.	•	Q.b. 4. 178
Non Dimifit.	•	Q.b. 5. 178
Dower.		Q.b. 6. 179
Escape.	•	Q.b. 7. 180
Non est Factum.	•	Q.b. 8. 180
Liberum Tenementum.		Q.b. 9. 182
Molliter Manus imposuit.		Q b. 10. 182
Ne Infeoffa pas.		Q. b. 11. 182
Ne Unques Executor.		Q.b. 12. 182
Ne Unques Receiver.	•	Q.b. 13. 183
Nil habuit in Tenementis.		Q. b. 14. 184
Non Feoffavit.	•	Q.b. 15. 184
Non tenet Mode & Forma.	•	Q.b. 16. 184
Note of Hand.		Q. b. 17. 184
Plene Administravit		Q. b. 18. 185
Riens per Descent.		Q. b. 19. 186
Robbery. On the Statute of	Winton.	Q.b. 20. 187
Son Affault Demesne.		Q. b. 21. 187
Nul Tort.		Q. b. 22. 188
Nul Waste.	Mark Ballings	Q. b. 23. 188
Proved in Evidence, what must,	or may be in	
as to the Plea.		R.b. 189
Affumplit.		Apple Lagran
Non Assumpsit infra sex Anno	)S	R. b. 2. 191
Non Concessit.		R. b. 3. 192
Non Debet.	•	R. b. 4. 193
Non Detinet.	•	R. b. 5. 195
Debt upon Bond against an He	fr.	R. b. 6. 195
Ejectment		R. b. 7. 195
Ejectment of a Rectory,	ALL LUCK	R. b. 8. 197
Eftovers.		R. b. 9. 197
Parco Fracto.	7.4	R. b. 10. 197
Per quod Servitium amisit, &c		R. b. 11. 197
Policies of Infurance.		R. b. 12. 198
Postesfory Actions.		R. b. 13. 199
Quantum Meruit.		R. b. 14. 199
Trespass.	1 35	R. b. 15. 200
With a Continuando,		R. b. 16. 200
Trover.		R, b. 17. 201
Where the Onus Probandi lies on	the Plaintiff,	and
where on the Defendant.	4.15.1764	S. b. 201
What shall be Evidence of what.	100000000	T, b. 1. 202
The state of the s		
Accessory.		- 202

ing as an ithout quaninistration.  reement. Enormia in. in in Fee. wer. ts. implit in int. iff of a Mikrupts. fing or Prik in Order mon. imon Recelent. tempt. tempt. tempt. tempt.	Respect	the	the S	ves.		T. b. 2. T. b. 3. T. b. 4. T. b. 5. T. b. 6. T. b. 7. T. b. 8. T. b. 10. T. b. 11. T. b. 12. T. b. 13. T. b. 14. T. b. 15. T. b. 16. T. b. 17. T. b. 17.
reement. Enormia in. in in Fee. wer. tts. implit in int. iff of a M krupts. fing or Pr k in Orde mon. imon Rec fent. tempt.	Respect	t to	the S		te of Fra	T. b. 3. T. b. 4. T. b. 5. T. b. 6. T. b. 7. T. b. 8. T. b. 9. T. b. 10. T. b. 12. T. b. 13. T. b. 14. T. b. 15. T. b. 16. T. b. 17.
reement. Enormia in. in in Fee. wer. ts. implit in inint. mentation iff of a M krupts. fing or Pr k in Orde mon. imon Recelent. tempt. tempt.	Respect	icara		Statu	te of Fra	T. b. 4. T. b. 5. T. b. 6. T. b. 7. T. b. 8. T. b. 9. T. b. 10. T. b. 12. T. b. 13. T. b. 14. T. b. 15. T. b. 16. T. b. 17.
Enormia in. in in Fee. wer. its. implit in init. mentation iff of a M krupts. fing or Pr k in Orde mon. imon Recelent. tempt. tempt.	Respect	icara		Statu	te of Fra	T. b. 5. T. b. 6. T. b. 7. T. b. 8. T. b. 9. T. b. 10. T. b. 11. T. b. 12. T. b. 13. T. b. 14. T. b. 15. T. b. 16. T. b. 17.
Enormia  n.  n in Fee.  wer.  ts.  mpfit in  aint.  mentation  iff of a M  krupts.  fing or Pr  k in Orde  mon.  mon Rece  fent.  tempt.  tents of D	Respect	icara		Statu	te of Fra	T. b. 6. 2 T. b. 7. 2 T. b. 8. 3 T. b. 9. 2 T. b. 10. 2 T. b. 12. 2 T. b. 13. 2 T. b. 14. 2 T. b. 15. 2 T. b. 16. 2 T. b. 17. 2
m in Fee. wer. tts. implit in int. iff of a M krupts. fing or Pr k in Orde mon. imon Recelent. tempt.	Respect	icara		Statu	te of Fra	T. b. 7. 2 T. b. 8. 3 T. b. 9. 3 T. b. 10. 3 T. b. 11. 3 T. b. 12. 3 T. b. 14. 3 T. b. 15. 3 T. b. 16. 3 T. b. 17. 2
m in Fee. wer. ts. implit in int. mentation iff of a M krupts. fing or Pr k in Orde mon. imon Recelent. tempt.	of Value of	icara		Statu	te of Fra	T. b. 8. 7 T. b. 9. 7 T. b. 10. 7 T. b. 12. 7 T. b. 13. 7 T. b. 14. 7 T. b. 15. 2 T. b. 16. 2 T. b. 17. 2
wer.  ts.  implit in  int.  mentation  iff of a M  krupts.  fing or Pr  k in Orde  mon.  mon Recelent.  tempt.  tempt.	of Value of	icara		Statu	te of Fra	T. b. 9. 2 T. b. 10. 2 T. b. 11. 2 T. b. 12. 2 T. b. 13. 2 T. b. 14. 2 T. b. 16. 2 T. b. 17. 2
ts.  Implit in int.  Immentation iff of a M krupts.  Ing or Pr k in Order  Immon.  Immon Recelent.  Itempt.  Itempt.  Itempt.	of Value of	icara		Statu	te of Fra	T. b. 10. 2 T. b. 11. 2 T. b. 12. 2 T. b. 13. 2 T. b. 14. 2 T. b. 16. 2 T. b. 17. 2
implit in int.  mentation iff of a M krupts. ling or Pr k in Order mon. imon Recelent. tempt. tents of D	of Value of	icara		Statu	te of Fra	T. b. 11. 2 T. b. 12. 2 T. b. 13. 2 T. b. 14. 2 T. b. 15. 2 T. b. 16. 2 T. b. 17. 2
mentation iff of a M krupts. ling or Pr k in Orde mon. limon Rec lent. lents of D	of Value of	icara		Statu	te of Fra	T. b. 11. 2 T. b. 12. 2 T. b. 13. 2 T. b. 14. 2 T. b. 15. 2 T. b. 16. 2 T. b. 17. 2
mentation iff of a M krupts. ling or Pr k in Orde mon. lmon Rec lent. lents of D	lanor. ocurin		iges.	•	,	T. b. 13. 2 T. b. 14. 2 T. b. 15. 2 T. b. 16. 2 T. b. 17. 2
iff of a M krupts. fing or Pr k in Order mon Reconstruction fent. tempt.	lanor. ocurin		iges.	•		T. b. 14. 2 T. b. 15. 2 T. b. 16. 2 T. b. 17. 2
krupts. fing or Pr k in Orde mon. mon Rec fent. tempt. tents of D	ocuring	g.		•	, .	T. b. 14. 2 T. b. 15. 2 T. b. 16. 2 T. b. 17. 2
fing or Pr k in Order mon. mon Receivent. tempt. tempt.	rs.	g.				T. b. 15. 2 T. b. 16. 2 T. b. 17. 2
fing or Pr k in Order mon. mon Receivent. tempt. tempt.	rs.	g.				T. b. 16. 2 T. b. 17. 2
k in Ordermon. Imon Receivent. Eempt. Eents of D	rs.		•			T. b. 17. 2
mon. Reclent. tempt.			-			- ·
mon Received.	overy.					T. b. 18. 2
tent. tempt. tents of D	-					T. b. 19. 2
empt.						T. b. 20. 2
ents of D						T. b. 21. 2
	eeds					T. b. 22, 2
	ctus,					T. b. 23. 2
hold.						T. b. 24. 2
om of a N	Sanor					T. b. 25. 2
						T. b. 26. 2
			1.			T. b. 27. 2
		Dicci	15.			T b 29 2
	int.		•			T. b. 28. 2
		•			•	T. b. 29. 2
		•				T. b. 30. 2
	,					T. b. 31. 2
			•			T. b. 32. 2
anchileme	ent.	****	-	0.1		T. b. 33. 2
eft Money	paid.	The	Life	ct th	ereot.	T. b. 34. 2
ment.					•	T. b. 35. 2
	rliamer	nt M	en.		•	T. b. 36. 2
		•				T. b. 37. 2
				•		T. b. 38. 2
	pension			-		T. b. 39. 2
		-		•	•	T. b. 40. 2
Imprison	ment.		-			T. b. 41. 22
Return.					•	T. b. 42. 22
arm Rent	ts.		-			T. b. 43. 23
						T. b. 44. 22
levied.						T. b. 45. 22
of Fifhe	ry.					T. b. 46. 22
ulent Cor	veyan	ce, c	or Sa	le.		T. b. 47. 22
						T. b. 48. 22
-6.						T. b. 49. 22
rechold.	Money	. 8	c.			T. b. 50, 22
forment o	t the T	Cime	of th	he O	utlawry	T. b. 51. 22
	. the		01 11			T. b. 52. 22
	om of Medence relation of Resizen.  Introduction of Resizen.  Introduction of Landranchifement Money timent.  Introduction of Parawament.  In y and Suffe at Will.  Impriform Return.  Farm Rendered to Fisher the Introduction of Parawament.  I levied.  I to Fisher the Introduction of Parawament.  I levied.	om of Merchants lence relating to land of Rent. lizen. lent. left of Land. ranchifement. left Money paid. left will. lef	om of Merchants. lence relating to Deed land of Rent. lizen. lent. lent. left of Land. left Money paid. The left Money paid. The left ment. lion of Parliament M lowment. lil. ly and Sufpension. le at Will. Imprisonment. Farm Rents. levied. levied	om of Merchants. lence relating to Deeds. land of Rent. lizen. lent. lent. left of Land. left Money paid. The Effectment. lion of Parliament Men. lowment. lil. ly and Sufpension. e at Will. Imprisonment. Return. Farm Rents. levied. t of Fishery. lulent Conveyance, or Sal-Writing. Freehold, Money, &c. fonment at the Time of the	om of Merchants. lence relating to Deeds. land of Rent. lizen. lent. lent. lent. left of Land. left Money paid. The Effect the thent. lion of Parliament Men. lowment. lil. ly and Sufpension. e at Will. Imprisonment. Return. Farm Rents. levied. t of Fishery. lulent Conveyance, or Sale. l-Writing.  Freehold, Money, &c. fonment at the Time of the O	om of Merchants.  lence relating to Deeds.  land of Rent.  lent.  levied.  levied.

In Custodia Marefoballi	Page
In Cuftodia Mareschalli.	T. b. 53. 225
Inrollment.	T. b. 54. 226
Infimul Computaffet	T. b. 55. 226
Intestacy.	T. b. 56. 227
Judgment	T. b. 57. 227
Legitimo Modo acquietatus.	T. b. 58. 227
Levancy and Couchancy.	T. b. 59. 227
Lewdness.	T. b. 60. 227
Libel	T. b. 61. 228
Liking Goods, &c	T. b. 62. 229
Limitations	T. b. 63. 229
Living or Dead.	T. b. 64. 230
Loft Deeds	T. b. 65. 231
Malicious or Vexatious Profecutions, &c.	T. b. 66. 234
	T b 65 225
Manor and Contents of a Manor.	T. b. 67. 235
Mariners Wages.	T. b. 68. 235
Marriage.	T. b. 69. 235
Marriage Agreement.	T. b. 70. 236
Modus Decimandi.	T. b. 71. 237
Money received or laid out to a Man's Ufe.	T. b. 72. 237
Mortuary.	T. b. 73. 238
Murder of Baftards	T. b. 74. 238
Nonage	T. b. 75. 239
Non Affumpfit.	T. b. 76. 239
Non Compos	T. b. 77. 239
Non est Factum.	T. b. 78. 239
Notice	T. b. 79. 240
Not taking the Oaths.	T b. 80. 240
Nul Diffeifin.	T b 81 240
Number of Acres in a Fine.	T. b. 81. 240
Nufances.	T. b. 82. 240
	T. b. 83. 240
Original Writ.	T. b. 84. 241
Parcel of a Manor.	T. b. 85. 241
Payment Modo & Forma.	T. b. 86. 24%
Pedigrees	T. b. 87. 241
Perjury.	T. b. 88. 241
Possession.	T. b. 89. 246
Prescription.	T. b. 90. 247
Priority of Birth.	T. b. 91. 247
Rape	T. b. 92. 247
Records	T. b. 93. 248
Rector of a Church	T. b. 94. 248
Releafe	T. b. 95. 248
Reputation of being Part.	T. b. 96. 249
Request	T. b. 97. 250
	T b 08 250
Refignation.	T. b. 98. 250
Retainer of a Chaplain.	T. b. 99. 250
Reviver of Promifes	T. b. 100. 250
Revocation	T. b. 101. 251
Right of Soil.	T. b. 102. 251
Riot.	T. b. 103. 251
Sale by Sheriff.	T. b. 104. 251

Chidence.		Page
Scienter		T. b. 105. 251
Seats in a Church.	•	T. b. 106. 251
Seisin in Fee of the King and oth	iers.	T.b. 107. 251
Settlement.		T. b. 108. 252
Simony.	-	T. b. 109. 252
Sola & Separalis Pastura.		T. b. 110. 253
Solvit ad Diem		T. b. 111. 253
Submission to Arbitration.		T. b. 112. 254
Such Liberties		T. b. 113. 254
Surrender of Leafe, Office, &c.		T. b. 114. 254
Tender.	-	T. b. 115. 254
Things done at a former Trial.		T. b. 116. 255
Tithes discharged		T. b. 117. 255
Trees.		T. b. 118. 256
Trover.		T. b. 119. 256
Truft		T. b. 120. 257
Vexatious Profecution.		T. b. 121. 257
Unity of Poffession.		T. b. 122. 257
Usage of granting Offices by Spiri	tual Perfons.	T. b. 123. 257
Ufury.		T. b. 124. 258
Way.		T. b. 125. 258
Will.		T. b. 126. 258
Witness interested.		T. b. 127. 260
Evidence. Demurrer to it.		U.b. 1. 260
Bills of Exceptions		W. b. 262
Iffues out of Chancery		X. b. 266

#### Ebidence.

## (A) Witness. Who may be.

I. I T is a good challenge to the witness to say, that he was one of the accusers, quod nota. Br. Corone, pl. 219. cites 4 M. 1.

2. Oftentimes a man may be challenged to be of a jury, that cannot be challenged to be a witness; and therefore though the witness be of nearest alliance, or kindred, or of counsel, or tenant, or servant to either party, (or any other exception that maketh him not infamous) or to want understanding, or discretion, or a party in interest, though it be proved true, shall not exclude the winness to be sworn, but he shall be sworn, and his credit upon the exceptions taken against him lest to those of the jury, who are tryers of the sact, insomuch as some books have said, that though the witness named in the deed be named a dissersor in the writ, yet he shall be sworn as a witness to the deed. Co. Lit. 6. b.

3. An infidel cannot be a witness. Co. Lit. 6. b.

4. A person that is infamous, as if he be attainted of a false verdict, or convicted of perjury, or of a pramunire, or of forgery, upon the stat. 5 Eliz. cap. 14. and not upon the stat. 1 H. 5. cap. 3. or convict of felony, or by judgment lost his ears, or stood upon the pillory, or tumbrel, or been stigmaticus branded, &c. Whereby they become infamous for some offences, Quæsunt minoris culpæ sunt majoris infamiæ. Co. Litt. 6. a. b.

5. A Jew may be a witness, being sworn on the Old Testament. 2 Keb. 314. pl. 23. Hill. 19 & 20 Car. 2. B. R. Robeley v. Langston.

6. A peer produced as a witness ought to be sworn. 3 Keb. 631.

Earl of Shaftsbury v. Digby.

7. An approver or an accomplice may be a witness till he is indicted. Law of Evid. 51. cap. 4. cites State Trials, 1 vol. 606. 619. 782. 2 vol. 377. 492. 3 vol. 117. 136. 4 vol. 10. Vol. XII.

8. Where

Ibid. fays, perjury at common the fame; the judgment; otherwise if a jury be convict in an attaint, and cites Rast. 56. a.

8. Where the difability is only the consequence of the judgment, Quere of a the King may pardon it; but where the disability is part of the judgment itself, the King's pardon will not take it away; therefore if a man be convicted of perjury on the statute, the King's the law be pardon will not restore; for it is not a consequence but part of the judgment, viz. quod imposterum non sit receptus ut testis; for there the cites Co. Ent. 368. But a pardon by act of parliament will redisability is store him in that case; per Holt Ch. J. 2 Salk. 689. pl. 1. only a confe-quence and Pasch. 7 W. 3. B. R. in Case of the King v. Crosby.

9. No Quaker or reputed Quaker shall be qualified to give

10. 4 and 5 Anna 16. All witnesses who ought to be allowed good witnesses upon trials at law shall be deemed good witnesses to prove any

evidence in any criminal cause, by virtue of the statute 7 & 8 W. 3.

nancupative will.

11. One being produced to be an evidence against the appellee, who was under 12 years of age, and the appellee's counsel objected to him for that reason, and besides they said he had taken money. Holt Ch. J. faid, that if he knew the danger of an oath, he might be an evidence; and that appearing he was admitted. 11 Mod. 228. B. R. pl. 2. Trin. 8 Ann. Young v. Slaughterford.

#### (B) Witnesses. Who Feme in the Case of her Baron.

#### Or Baron in Case of his Feme.

1. T is informed, that C. one of the defendants, examined his own wife as a witness; it is therefore ordered, the plaintiff may take a subpæna against her on his behalf, and if C. will not suffer her to be examined on the plaintiff's party, then her examination on the faid C's party is suppressed. Cary's Rep. 135. cites 22 Eliz. Bent and Allet contra Coliton.

2. Wife examined to discover her husband's deceit. Toth. 158.

cites 38 Eliz. Lake v. Dean.

3. The wife-to be examined as a witness. Toth. 149. cites

41 Eliz. h. b. fo. 10. Preston v. Powel.

4. A feme covert cannot be a witness against her busband, quia funt animæ duæ in una carne; for it would be, if admitted, an occasion of perpetual dissension between man and wife. Co. Lit. 6. b. cites Sir James Croft's Cafe.

5. A wife not to be examined against her husband. Toth. 160.

cites 10 Jac. Holman v. Audley.

6. The Court was moved, to know whether the wife of a bankrupt can be examined by the commissioners upon the statute of bankrupts? And they were of opinion, the could not be

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examined, for the wife is not bound, in case of high treason, to discover her husband's treason, altho' the son be bound to reveal it; therefore by the common law she shall not be examined. Brownl. 47. Pasch. 10 Jac. Anon.

7. 21 Jac. 19. f. 6. The commissioners shall have power to examine the wife of a bankrupt upon oath for the discovery of his estate, goods and chattels, and fuch wife refufing to appear, or to answer interrogatories, Shall incur the same penalties as are provided against

other persons in the like cases.

8. If a privy counsellor be to be examined in the Star-chamber, if the privy counsellor said, that the defendant related that to him as a privy counsellor, and not otherwise, the counsellor is not bound to answer further to any thing than the defendant hath

related to him. Nov. 154. Anon.

9. In ejectment, the plaintiff made title to his leffor to the lands in question, as fon and heir of Jerome Jacques, and Hannah his wife, in right of Hannah. The defendant gave in evidence, that Jerome Jacques was married, before he was married to Hannah; and the avoman, to whom it was supposed he was married before, was produced at the trial, fummer affizes 13 W. 3. at Maidstone, to prove this marriage. The counsel for the plaintiff approved her testimony, because she swore for her advantage, viz. to have a husband, the husband then being living. But nevertheless, Gould Justice of B. R. then judge of affize, admitted her testimony. But afterwards the same cause, upon the same title, between the fame parties, was tried before Holt Chief Justice at the affizes in March at Maidstone, I Ann. and he refused, after debate, to L admit the former wife to be a witness for this purpose; but, upon other evidence, the former marriage was proved to the fatisfaction of the jury, being gentlemen, whereupon they found a verdict for the defendant. But in the former trial before Gould Justice, the jury found a verdict for the plaintiff. 2 Ld. Raym. Rep. 752. I Ann. 1701-2. Broughton v. Harper.

10. A woman was indicted upon the statute I Jac. cap. 11. for Brownl. 47. marrying a fecond hufband, the first being alive. Upon not guilty Pasch. pleaded, the first husband was produced to prove the marriage; but Anon. fays, the Court totally refused to admit his evidence, and said, that he the wife is could not be a witness against his wife, nor she against her not bound to husband, because it might occasion implacable distension, in any husband's case but treason; and they denied the Lord Audley's Case treason, tho in Hutt. 116. to be law. Raym. 1. Mich. 12 Car. 2. B. R. Mary the fon be bound to re-

Grigg's Cafe.

vealit; and

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therefore by the common law she shall not be examined.

I.I. A woman is not bound to be favorn, or to give evidence against another, in case of theft, &c. if her busband be concerned, though it be material against another, and not directly against her husband. 2 Hale's Hift. Pl. C. 301.

12. If a feme covert acknowledge a thing at a trial, which is for the present advantage of her husband, but is for her own future difaddisadvantage, yet this is no good evidence to a jury. Mich. 23 Car. B. R. For her husband's present advantages are her's also, and more looked upon than her future disadvantage. L. P.

R. 550.

Veat. 49.

13. In an information for a cheat, baron and feme were difference, the S. Cafe, the S. on payment of 1001. which he retook of her again prefently in was fworn by the opinion of three Mich. 21 Car. 2. B. R. King v. Parris & al.

justices contra Twissen, this suit being for the King.—Keb. 57. pl. 84. S. C. actordingly.—12 Mod. 340. cites S. C. that she was received as a witness to convict one upon an information, for a practice for drawing her in, when sole, to give warrant of attorney for confessing a judgment upon an unlawful consideration, whereby execution was sued against husband. And Holt said, that though a seme covert could not by law be a witness for or against her husband, yet in the Lord Audley's Case, it be-

ing a rape upon her person, the was received to give evidence against him.

3 Keb. 193.

14. A woman forcibly married contrary to 3 H. 7. cap. 2.

15. 427. the fhall be admitted to give evidence against her husband. Resolved Brown, S. I Vent. 243. Trin. 25 Car. 2. B. R. Brown's Case.

C. and the

hulband was found guilty and executed.

15. Feme de facto, but not de jure, as by being forcibly married, was allowed to be a witness against such baron, for what-soever was done while she was under that violence was not to be expected. Vent. 244. Trin. 25 Car. 2. B. R. John Brown's Case.

16. The wise executrin to her husband, married a second husband. A bill is exhibited against them to discover the trust; the busband and wife disagreed in the matter, and put in severally their answers; the husband denied the trust, but the wife confessed it. The cause proceeded to hearing, and the plaintist proved the trust only by one witness, which the plaintist insisted on, with the wise's confession, to be sufficient, the matter being but in that wherein she was concerned as executrin. But the bill was dismissed, quia the wise's answer shall not bind the husband; ex relatione Sir John Churchill and Serjeant Rawlinson. Chan. Cases, 39. Trin. 32 Car. 2. Anon.

17. In an indictment profecuted by the husband for feducing away his wife, and keeping her fometime in adultery, the wife was admitted to be a witness against the defendant coram Justice Wyndham at Lent assists at Aylesbury, and the defendant found guilty. She may be a witness to prove a cheat upon her and her

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husband. L. E. 55. pl. 12. cites T. p. Pais, 160.

18. The plaintiffs were infants, and the children of the defendant's wife by a former husband; their bill was to have an account of the estate left them by their father, and of the produce thereof. Upon the hearing it was referred to an account, and the defendant and his wife were to be examined on interrogatories for discovery of the estate; the wife being at variance with the husband, and living apart from him, upon her examination, made the estate of

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the plaintiffs (who were her children) as great as she could, and thereupon to fix the charge upon the husband. The plaintiffs, upon a petition to the Master of the Rolls, obtained an order to examine the wife as a witness against the husband de bene esse, and the Master, upon her evidence, had charged the husband with feveral fums of money, as interest, and produce of the infants estate; but now, upon exceptions to the report, the Lord Chancellor difallowed her evidence, and declared the wife could not be a witness against her husband. 2 Vern. 70. pl. 11. Trin. 1688.

Cole v. Gray.

19. Question was, Whether one who had been attorney for defendant thould be compelled to be a witness; and Darnell said. this being a criminal matter he should, but not so in a civil matter. But Pratt faid, that if he be fworn, we must ask him his whole knowledge, and perhaps he cannot discover that without charging himself, for if one's declaration generally may be made use of against him, a fortiori what he says upon oath shall; and this feemed to weigh with the Court. But Holt faid, he was of opinion against his brothers some years before, in the case of one Holford, that any thing an attorney knew, otherwise than quatenus an attorney, he ought to declare. But his brothers held, an attorney ought not upon any account to be received to reveal his client's secrets; and Holt said, if a client bring a forged deed to counsel, the counsel ought to prosecute him, and that he had known fuch a thing done. 12 Mod. 341. Mich. 11 W. 3. in Cafe of the King v. Warden of the Fleet.

20. Per Holt, at nisi prius; I have known it ruled, that a legatee should not be a witness to prove affets in the hands of executors in debt by a creditor; and it has been an old exception, but I fee not the reason of it, for he swears to lessen the assets, and the legatee was fworn. 12 Mod. 385. Pafch. 12 W. 3. Anon.

21. Trespass for an affault upon the plaintiff's wife, and getting her with child, and what the wife declared in her labour, rejected to be evidence. 12 Mod. 375. Pafch. 12 W. 3. Adams v.

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22. Debt by husband, and it appearing to have become due to his wife as a separate dealer, a discourse of the estate concerning it, was given evidence for defendant. Annuente Holt. Mich. 13 W. 3.

23. In an action of affault and battery brought by the hufband against the defendant for an intent to ravish his wife, she was admitted an evidence, which Holt faid, it was because the wife cannot give any confent, though it be not felony. 11 Mod. 224.

pl. 19. Pasch. 8 Ann. B. R. Anon.

24. And Holt faid, that A. having laid 51. of the event of the cause, was no objection to the wife of A. being admitted to be an evidence, because it shall not be in the power of a third person to disqualify one who otherwise would be a good evidence, and thereupon she was admitted to give evidence. 11 Mod. 224. pl. 19. Anon.

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28. Feme

28. Feme allowed to be a witness against her husband, as to a moiety of monies borrowed by her on bond, and placed out on a mortgage, which he claimed, though himself had given it to the concealment of the marriage, as the wife had done; and therefore, and because her evidence was also supported by the evidence of the mortgagor, and she having transacted and appeared throughout the whole affair as a feme fole, the moiety of the mortgagemoney was decreed to the plaintiff (who lent the feme fo much) with costs. Abr. Equ. Cases, 226. Hill. 1719. Rutter v. Baldwin.

29. In the Case of RUTTER v. BALDWIN, Hill. 1719, the Court agreed clearly that the wife shall never be admitted by an answer or otherwise as evidence to charge her husband; as where a man marries a widow executrix, &c. her evidence shall not be allowed to charge her fecond husband with more than she can prove to have actually come to her hands. Abr. Equ. Cafes,

227. pl. 15.

But fee tit. Trial(H. f.) pl. 4. and the notes there.

30. In an indictment against Lord Audley, for affisting another to commit a rape on his wife, the was admitted to be a witness against him. Hutt. 115.

#### (C) Witnesses. Who. Persons interested by Accident.

1. A Subscribing witness to livery and seisin on a seossiment after-wards became tenant at will of the same land. Yet he was allowed to be a good witness. Bulf. 202. Pasch. 10 Jac. Anon.

2. Feoffees in trust to be examined as witnesses. Toth. 168.

in Hill. 1 Car. Mildmay v. Com. Warwick.

3. Feoffees for a town nor recorder to be examined but for mat-

ter of fact. Toth. 168, Trin. 2 Car, Clotworthy v. Hunt. 4. In an information for forgery, no man that is or may be a leser by the deed, or who may receive any benefit or advantage by

the verdict being found against the defendant, shall be a witness. 3 Salk. 172. pl. 4. Watts's Cafe. Hardr. 331. pl. 7. Trin. 15

Car. 2. in Scace. S. C.

5. An executor may be a witness in a cause concerning the estate if he has not the furplufage given him, and so I have known it adjudged. P. Hales. 1 Mod. 107. pl. 1. Pasch. 26 Car. 2. B. R. Fountain v. Cook.

6. Several persons were examined as witnesses no ways concerned in interest, and the cause heard, and issues directed to be tried, but the trials were not carried on, and the cause slept many years, and after abated; and then those persons rubo had been examined as witnesses became heirs at law, and thereby interested in the matter; the cause was revived and reheard, and the same iffues directed to be tried; and the persons who had been so examined (being now plaintiffs) prayed to have an order, that their depositions taken when they were disinterested might be read as cvidence

was cited

6. 35. S. P.

evidence at law for themselves; and my Lord Keeper ordered accordingly, and likened it to the Cafe, where one is the only, or only furviving witness to a deed, becomes after the party interefted, his hand may be proved at law; so if a witness to a deed becomes blind. Then the cause proceeded to trial at bar in C. B. where the whole Court held these depositions could not be read without confent, the parties being living; but the defendant confented, and had a verdict for him; and the plaintiff obtained a new trial, and then would have had the fame order; but my Lord Keeper faid, fince the Judges had refolved otherwife, he [ could not take upon him to make that evidence which was not, and therefore only ordered they should be read in evidence, as by law they might. Abr. Equ. Cafes, 224. Trin. 1702. Holcroft v. Smith.

7. The only living witness to a bond was made executor by the Williams's obligee, it has been ruled at law that the executor shall be allowed fays, that to prove the hands of the witnesses. 2 Vern. 700. Mich. 1715. this point in Case of Gosse v. Tracy.

by Serjeant Hooper, as what had happened in his own experience; and that the Court allowed evidence to prove the plaintiff's hand, he himfelf being difabled as much as if he was dead.

### (D) Trial. Witnesses.

#### What Persons may be, as Executors, Trustees, Guardians, &c.

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1. IN debt by 2 executors they counted of arrearages of account Ibid. pl. 6. made in the time of the testator. The defendant tendered his cites 9 H. 6. law that he owed them nothing, and prayed that they be examined; Ibid. pl. 7. but the Court held that they should not be examined of ano-cites o H.6. ther's act, but otherwise of an attorney, because he might have 58. S. P.—
been informed from his most are see Br. Francisco and like 117. been informed from his mafter, &c. Br. Examination, pl. 5. cites cites 10 H. 3 H. 6. 46.

2. It is a principal challenge to a juror, that he was an arbitrator before in the same cause, because it is intended, that he will incline to that party to which he inclined before; but contrary is it of a commissioner, because he is elected indifferent. P. Cook Ch. J. faid (nullo contradicente.) Godb. 193. pl. 276. Trin. 10 Jac. B. R. Sir Francis Fortescue v. Coake.

3. One Gates an executor was produced to prove the will as a quitnefs, to which exception was taken because of his executorship; but it was answered, that he had fully administered. To which it was replied, that afterwards affets might come to his hands; but the Court resolved, that it would not be presumed to bar his testimony, which was allowed in the principal case, being in ejectment. Tr. per Pais, 162. cited by Glyn Ch. J. in the Cafe of Brereton and Tatum. Mich. 1656 B. R. as the Ld. Chandois's Case, in which he was of counsel, and took the exception.

4. Trustees shall not be examined as w sesses one against another. Toth 285. cites Sherborne v. Foster and Townly. 7 Car.

Hard. 331.

5. A trustee may be a witness if he will release his trust, but not if pl. 7. Trin. he has conveyed it over, although for the King in an information of watts's forgery. Sid. 315. pl. 33. Mich. 18 Car. 2. B. R. Stevens v. Case S. P. Gerrard. So if he be in possession of the land itself, if it be only as a pl. 32 S.C. servant.

1 Sid. 315. S. C.

and by Maynard and Finch a witness was admitted in C. B. to prove a codicil of the Ld. Rutland's will, upon a release of his interest made while the jury were at the bar; and Twisden said, that in a Kentish cause at the bar he caused a release but the day before the trial, and it was admitted good; but Wind-

ham faid, that fuch are left to the jury as to the credit.

6. In a trial at bar to avoid a patent, a deputy to the party that would avoid the patent was allowed by three justices against one, to be a witness, because the suit was between the King and the patentee. Mod. 21. pl. 56. Mich. 21 Car. 2. B. R. Owen Hanning's Case.

7. A trustee cannot be a witness concerning the title of the fame land, because the estate in law is in him. L. E. 63. pl. 30.

cites T. p. Pais, 224.

8. A trustee may be a witness against cestui que trust; per Hale. Twisden dubitavit, L. E. 63. pl. 31. cites Trials per Pais, 229.

And7th edition 336. 9. A guardian in socage shall be admitted to be a witness for the infant; because he is accountable. Tr. per Pais, 228.

To. In evidence to a jury at bar, a special issue by rule of Court was directed to try the custom of Lady Percie's manor of Westwood in Cumberland, whether fines on the tenants on the lord's death be due to the heirs or successors of the lord during his minority. The defendant excepted to the fleward, that he had see on admission; sed non allocatur, and he was sworn. L. E. 79. pl. 74. cites 3 Keb. 90. pl. 31. Mich. 24 Car. 2. B. R. Champian v. Atkinson.

11. S. had laid himself to be sole proprietor of a ship and tackle, &c. and the witness swore at the time of the action brought, that he was equally concerned in every thing, but long since had sold his interest, so that now he was not one farthing concerned in the consequence of the cause; yet the Court held, that he was no competent witness. Skin. 174 pl. 4. Pasch. 36 Car. 2. B. R. San-

dys v. Custom-house Officers.

12. An executor may be a witness in a cause concerning the estate, if he has not the surplusage given him by the will; per Hale Ch. J. And he said he had known it so adjudged. Mod. 107. pl. 1. Pasch. 26 Car. 2. B. R. Fountain v. Cook.

13. An executor was admitted to prove the revocation of a legacy, though he had proved the will, for at the time of proving the will he only swears he believes it to be the last will, and at that time he might not know of the revocation. Vern. 20, pl. 12. Mich. 1631. Jervois v. Duke.

14. In debt upon bond, brought by J. S. Sheriff of the county &c.

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The defendant pleaded, that the said bond was acknowledged by J. N. to the plaintiff, for the office of under-sheriff, and that he was surety in the said bond; and then he pleaded the statute of 5 & 6 Ed. 6. cap. 16. against buying and selling offices, &c. And upon the trial A. was produced as a witness, to give an account upon what occasion this bond was acknowledged, &c. And Holt Ch. J. before whom the cause was tried Mich. 5 W. & M. at the sittings for Middle-sex, resused to admit A. to be a witness, because it appeared that he was privately intrusted by both parties to make the bargain, and to keep it secret. And (by him) a trustee shall not be a witness, in order to betray the trust. Ld. Raym. Rep. 733. Anon.

15. In an action of affault and battery brought by the husband against the defendant for an intent to ravish his wife, she was admitted an evidence (which Holt Ch. J. said, it was because the wife cannot give any consent, though it be not felony).

11 Mod. 224. pl. 19. Pafch. 8 Ann. B. R. Anon.

16. And Holt held, that A. having laid 51. of the event of the cause, was no objection to the wife of A being admitted to be an evidence; because it shall not be in the power of a third person to disqualify one who otherwise would be a good evidence; and thereupon she was admitted to give evidence. 11 Mod. 224. pl. 19. Anon.

17. Holt Ch. J. said, that barely being a factor, does not incapacitate a man for being an evidence in a cause, otherwise if he be interested. 11 Mod. 226. pl. 23. Pasch. 8 Ann. B. R. Mason

v. Hogsden.

18. A trustee has been examined as a witness; per Anthony A grantee, when he appears to be a bare trustee is a good evidence to prove the execution of the deed to himself. Wms's Rep. 290.

Mich. 1715, fays it was so declared in the Case of Goss v. Tracey.

19. Trustee frequently allowed a witness in equity; per Master [ 8 ] of the Rolls. Mich. 7 Geo.

20. A trustee shall not be allowed to be examined as a witness in a cause wherein he is ordered to account. Barnard. 416. Hil. 1740. in Case of Smith v. the Duke of Chandois.

21. In case of a bill brought by prochein amy, the prochein cannot be a witness, because he is liable to pay costs. Mich. 1738. B. R. per Chapple J. in Case of Milward v. Sterling.

### (E) Witnesses. Persons influenced by Kindred.

1. BEING cousin to the party is no exception to hinder his evi- Co. Litt. 6. b. S. P. dence in our law, per Hutton; to which all agreed. Het. 137. Pasch. 5 Car. C. B. in Moor's Case.

## (F) Witnesses. Who may be. Persons Interested.

1. BY Roll Ch. J. upon a trial, although one who is a legatee by a will may not be admitted for a witness to prove that will, yet he may be examined to prove a deed or other thing, which has not relation to the will, in respect of the interest which he claims by the

will. Sty. 370. Pasch. 1653. Anon.

2. In an action upon the statute of Winton, if the iffue be whether the place of the robbery be within the hundred or not, no inhabitants of land within that hundred may be a witness, but the owners of the land, and not inhabiting may. 2 Sid. 2. Mich. 1657. Oliver

v. Wallington Hundred.

3. A witness who subscribed his name to a feoffment was produced to prove livery and feisin, and though he had afterwards an estate at will in part of the land, yet he is a good witness to prove livery and feifin, this being in affirmance of the feoffment; per Fleming Ch. J. and the whole Court. Bulft. 202. Pafch. 10 Jac. Anon.

4. A feoffment in fee was made to the use of J. S. and two witnesses were subscribed to prove the livery of seisin. Afterwards one of the witnesses had an estate at will made to him of the said land, and he being produced to witness the execution of the feofiment by livery of feifin, was excepted against, because he was now a party interested in part of the land, and so his oath was to make his own estate good. But this exception was disallowed by the whole Court, and that he might well be fworn as a lawful witness to prove the executing of a feoffment by livery and scisin, this being in affirmance of the feofiment, and he was fworn, and his testimony received and allowed; per Fleming Ch. J. and tot.

Cur. Bulft. 202. Pasch. 10 Jac. Anon.

So a witness was admitted to prove a leafe of ejectment, though he because both plaintiff and

5. If one produced as a witness had part of the lands in question, and had disposed of them after notice of trial, although the sale was bona fide, yet shall not his evidence be received; for if the title he has made be disaffirmed, an action lies against him; but if had the in- tuch witness claims an estate for life or years in part of the land heritance in paramount both their titles, he may be received as an evidence. the landslet, Sid. 51. 1 Keb. 134. Mich. 13 Car. 2. Wickes v. Smallbrooke.

defendant claimed under the fame person. Sty. 482. Hox v. Swan.

6. A prebendary makes a lease of a rectory to his son, with usual covenants. In a fuit by the fon against A. claiming by an ancient lease and in possession, the father (being then made bishop of the same diocess in which) is allowed to be sworn. Sid. 75. pl. 6. Pasch. 14 Car. 2. B. R. Gie v. Ryder.

7. In case of forgery, perjury and usury, the person grieved shan't be received as a witness, because he may have advantage

by the verdict. Hard. 332. pl. 7. Trin. 15 Car. 2. in Scac. in Watts's Case.

8. A legatee after receipt of the legacy, without giving any collateral fecurity for repayment, will not be compelled by bill in Chancery to make repayment, but if paid pending fuch bill, whereby to let in his testimony without any decree, he is no sufficient witness; but the payment being before, the Court would not admit any exception, so much as to her credit, et juratur. Keb. 651. pl. 26. Hill. 15 & 16 Car. 2. B. R. Payton v. Humphryes.

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9. Legatee or devisee of an annuity may be a witness to prove the will, if he hath given an acquittance of the legacy, or released the said annuity, notwithstanding that this be done pending the action; and though it be sealed in Court when that cause is trying, yet the party so releasing is a good witness; per Curiam. Sid. 315. pl. 33. Mich. 18 Car. 2. B. R. Stephens v. Gerrard.

10. In trover by assignees of commissioners of bankrupts, the defendant excepted to a witness, because he was a creditor, and may come in before a division made; but after 4 months after any dividend, he is a good witness; for no other dividend shall be intended, but here as no division being made, he was set aside. 2 Keb, 348. pl. 31. Pasch. 20 Car. 2. B. R. Bents v. Mico.

11. In a trial at bar to avoid a patent, a deputy to the party that would avoid the patent was allowed by 3 justices against 1 to be a witness, because the suit was between the King and the patentee. Mod, 21. pl. 56, Mich. 21 Car. 2. B. R. Owen Hanning's Case.

12. In an action of deceit for forging a will, a legatee was allowed and fworn as a witness in the trial for the forgery; for this makes nothing to the probate of the will or recovery of the legacy in the Spiritual Court, nor do they take notice of it. Try. per Pais, 240.

13. A special issue was directed to try the custom of a manor, whether a fine on the lord's death be due to the heir of the lord during his minority; exception was taken to the steward's being admitted a witness, because he had a fee on admission; sed non allocatur, and he was sworn. 3 Keb. 90. pl. 31. Mich. 24 Car. 2. B. R. Champian v. Atkinson.

14. A fmall legatee has been fworn to prove a will. Arg. Vent. 351. Mich. 32 Car. 2.

15. In ejectment upon a trial at bar, the title of the leffor of the plaintiff was upon the grant of a rent, with a clause of re-entry for non-payment. The defendant produced the executor of the grantor as a witness; it was objected, that he ought not to be admitted, because the grantor had covenanted for himself and his heirs to pay it; and that the executor being bound to pay it was no competent witness; but it was insisted on the other side, that this covenant annexed to a real estate, would bind the heir only, and not the executor. But the whole Court were against it; but then it was proved, that he had fully administered the inventory; but the plaintist giving a farther charge to maintain his title, that witness

was fet afide. Vent. 347. Hill. 31 & 32 Car. 2. B. R. Cook v. Fountaine.

16. In an information for forgery, and for publishing a forged deed, knowing it to be forged, it was adjudged upon a conference 10 ] with the Judges of B. R. by a Baron of the Exchequer, that no person who is or may be a leser by the deed, or may receive any benesit or advantage by the verdict being found against the desendant shall be a witness. 3 Salk. 172. pl. 4. Watts's Case.

An executor may be a witness in a caule con-

17. An executor was admitted to prove the revocation of a legacy, though he had proved the will, for at the time of proving the will, he only swears he believes it to be the last will; and at that time cerning the he might not know of the revocation. Vern. 20, pl. 12. Mich. estate, if he 1681. Jervois v. Duke.

duary legatee. Per Hale at a trial at bar. 1 Mod. 107. Fountain v. Cook.

18. If a man promise another that if he recover the land, the other shall have a lease of it, he is no good witness. Per Twisden J 1 Mod. 21. pl. 12. Mich. 1681. Owen Hanning's Cafe. Or. a fum of money. 3 Mod. 85. Mich. 1 Jac. 2. B. R. Hicks v.

S. P. cited by Lord Keeper, as ordered accordingly. in pl. 200. Hill. 1684-

19. Bailiffs that served an execution in breach of an injunction, find money hid in the house and carry it away; ordered, that the party at whose fuit the execution was taken out, should make fatisfaction for all damages which the plaintiff should swear he Vern. 3 8. had fustained. Per Finch C. and North K. confirmed the order, and in odium spoliatoris, allowed the oath of the injured party as fufficient to charge the wrong doer. Vern. 207. pl. 203. Mich. 1683. Childerns v. Saxby.

> 20. It is the constant practice not to permit one that has laid a wager as to a matter in dispute to be a witness; but if he has confessed the wager lost, and has paid it, it shall be intended to be duly paid, and therefore ought to be admitted a witness. 3 Lev. 152. Mich. 35 Car. 2. C. B. Rescous v.

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Vent. 251. S. P. obiter. -2 Show. 47. Arg. S. P.

21. It is usual where a man is a legatee, if it was an inconsiderable legacy, as 5s. (or 5l. to a man of quality) that he should nevertheless be a witness to prove the will, per Ld. K. North, Vern. 254. pl. 246. Mich. 1684. in Case of Corporation of Sutton Coldfield v. Wilfon.

22. Tenant that has nothing but a kiddel (i. e.) a wear in the sea, between high and low water mark, may be a witness to prove if there be a cuflom to cut trees without licence or not. 2 Sid. 9. Mich. 1657. in Case of Chamberlain v. Drake.

23. A patron cannot be a witness to maintain the title of his clerk in ejectment. 4 Mod. Arg. 17. Pasch. 3 W. & M. in

B. R. in Cafe of Jones v. Beau.

24. In an ejectment, a patron is never permitted to be a witness to maintain the title of his clerk. 4 Mod. 17. Pasch. 3 W. & M. in B. R. in Case of Jones v. Beau.

25. Upon capture of a prize, one part was agreed to belong to

the master, and the other two parts to the owners; the master disposed of one hundred chests of lemons to A. B. they bring account against A. B. and upon evidence at Guildhall a mariner was allowed to be sworn, though it appeared that he was to have a third part of the master; for per Holt Ch. J. the master is accountable to the mariners for their share, which they shall recover of the master, whether he recovers in this action or not. Skin. 403. Mich. 5 W. & M. in B. R. pl. 38. Anon.

26. Where a man makes himself a party in interest after a defendant has interest in his testimony, he may not by this deprive the plaintiff or defendant of the benefit of his testimony. As if [ 11 a man be a witness of a wager, &c. and after bets, this shall not be a reason to except against his being sworn to prove the wager. Skin. 586. pl. 5. Trin. 7 W. 3. ruled by Holt Ch. J. at nisi prius

in Middlefex. Barlow v. Vowell.

28. Bankrupt shall not be a witness to prove an act of bankruptcy, and faid to be refused; per Raymond Ch. J. But he admitted a bankrupt to give evidence as to the time of the act of bankruptcy; his wife shall neither be a witness for or against him to prove act of bankruptcy. And 27 Jan. in Canc. per Ld. Ch. Eglesham v. Haines. 1st. That the creditor of a bankrupt was not a witness, because he swears to increase his own dividend, whether more or less. 2dly. So it is in cases of commons and boundaries (that is) to enlarge either. 3dly, That an iffue in tail in life of his father may be a witness, because he has but a possibility; but a remainder-man after estate tail is no witness. athly, In this case, the objection was against a man who was a purchasor, i. e. the fon of the bankrupt, who claimed under settlement which was in dispute, (ut dicitur) fed sub judice, and not determined whether good or bad; but his deposition was read, because it is but a possibility of an interest which may affect him, if effects fufficient, the fettlement is good between him and the bankrupt; and this is uncertain how the effects may hold out, and whether good against the creditors not determined. Upon examination, upon a voir dire, if the party believes or admits he is interested, or if he denies it, and it is proved upon him, he is no witness, but in the present case the objection only goes to his credit. Ex relatione magistri Cruwys.

29. An heir at law may be a witness concerning the title of the land, but the remainder-man cannot, for he hath a prefent interest, but the heirship is a mere contingency. Coram Treby Ch. J. 1 Salk. 283. pl. 13. Mich. 10 W. 3. Smith v. Black-

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30. Upon trial of an information for a cheat; the fact was, Id. Raym. that the defendant had a promise of a note for 51. from his mother Rep. 396.

S. C. ruled in law, and by some flight he got her hand to a note of 1001. Et per by Holt Holt Ch. J. the mother cannot be a witness, being concerned in Ch. the consequence of this suit, which is a means to discharge her cordingly. of the 100% for though the verdict upon this information cannot Ch. J. faid, be given in evidence in an action upon the note, yet we are fure that he could

to hear of it to influence the jury. I Salk. 283. pl. 12. Mich. guish this 10 W. 3. at Guildhall. The King v. Whiting. Case from the Cafe of

perjury or forgery, where the party whose interest is defeated or prejudiced by the deed &c. is no evidence to prove the perjury or forgery. 1 Salk. 283. and Ld. Raym. Rep. 396. ut supra.

> 31. Tenant in tail, remainder in tail, he in remainder cannot be a witness concerning the title of these lands; for he has an interest, such as it is. 1 Salk. 283. pl. 13. Mich. 10 W. 3. coram Treby Ch. J. in Case of Smith v. Blackham.

> 32. A will of lands was attested by three witnesses, whereof the devifee was one; adjudged that he is no good witness with respect to this devise. Carth. 514. Hill. 11 W. 3. B. R. Hilliard v. Jen-

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33. A legatee may be a witnefs against a will, because he swears against his interest; but not a witness for the will, because he is prefumed to be partial in swearing for his own interest. 2 Salk.

691. pl. 5. in Canc. Oxenden v. Penrice.

34. In order to a new trial, an affidavit was read, that one of the witnesses had declared that he had got a guinea to stifle the truth, Gould J. faid, that an affidavit of him who had the guinea were something, but his saying is nothing. A witness's laying a wager in the cause is no hindrance to his being a witness; for the other has an interest in his evidence, which he cannot deprive him of. 7 Mod. 31. Trin. 1 Ann. B. R. George v. Pierce.

35. A blank indorfee of a bill of exchange is a good witness in trover for the faid bill of its delivery by him to the drawee's brother, &c. 1 Salk. 130. pl. 15. Pasch. 2 Ann. B. R. Lucas v. Haynes.

36. In action for running over the plaintiff's barge with his. thip, Holt Ch. J. would not fuffer the pilot to be a witness, because he was answerable, if faulty in steering, to the master. I Salk. 287. pl. 22. Hill. 2 Ann. Martin v. Hendrickson.

37. Where a witness confesseth himself interested, the party shall never be let in to support his testimony; and this, howfoever it appears, a decree was made in Canc. on the testimony of a witness, but while a petition was depending for a rehearing, a bill was preferred against him, and his answer confesset himself to be interested, and now his answer was read against him. Objected, that the discovery was not by proper means, but the witness ought to have been examined to these points, upon interrogatories at the communication, or otherwise articles ought to be exhibited against him upon facts which ought to be proved against him; fed non allocatur, for this could not be discovered otherwife. Articles may be granted to examine the competency of a witness as well as to his credit; perhaps the party might have demurred to this bill, it being to make himself a criminal; but if a man will answer such things as he need not, it is reasonable the other party should take advantage of it. Canc. Mich. 3 Ann. coram Ld. Keeper Master of the Rolls, Holt Ch. J. and Powel J. The fact here confessed, was, that he had given security

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for half of the land to one of the parties in case that party recovered, which he accordingly did do at the Rolls on the testimony of that one witness.

38. Though a witness is examined an hour together at law, if Equ. Abr. in any part of his evidence it appears that he was a party interest- S. C. and ed, the Court will direct the jury that he is no witness, nor any s. P.regard to be had to his evidence; per Wright K. 2 Vern. 464. pl. 424. Mich. 1704. Needham v. Smith.

39. A witness was examined before the hearing whilst she was interested, but after the hearing she released her interest, and was examined again before the Master. Lord Keeper allowed the depositions before the Master to be read. 2 Vern. 472. pl. 430.

Mich. 1704. Callow v. Mime. 40. Upon appeal from the Rolls, it was objected to the evidence of a witnefs examined in the cause, and read at the hearing at the Rolls, that fince the hearing in answer to a bill exhibited against him, he had confessed, that on the day on which he was to be examined as a witness, the plaintiff gave him a bond, that if the plaintiff recovered the land in question, he would convey part of it to the faid witness. The Lord Keeper, affisted by Holt C. J. and Powell J. were of opinion, that the answer ought to be read, to take off his evidence. 2 Vern. 463. pl. 424. Mich. 1704. Needham v. Smith.

41. In debt upon a joint and several bond against one of the obligors, the other can be no witness, for these persons are supposed to be interested, though they cannot have any benefit by any verdict given.

In case of burglary or robbery, where the prosecutor is intitled to [ 401. by late acts, &c. he may be a witness; for these acts do not alter the nature of the evidence before, and are advantages given to encourage persons to prosecute; and in robbery the examination of the party robbed is evidence propter necessitatem rei, because there can be no other person. Parker Ch. J. said, that he would have allowed, if all the feamen had made an infurance, the testimony of any of them; but there the objection was not against the master, as master, but as he had another interest.

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In case of the arrival of a ship, upon an action for seamen's wages, the feamen may be witnesses one for another, or else witnesses must very often be brought from beyond sea.

In the Case of Bath and Montague, after the trial there were feveral indictments of perjury preferred, for that the witnesses fwore that Sir J. C. was at . . . in 1701, and when one of thefe came to be tried, the others that were indicted were admitted as witneffes.

In an action for negligent keeping of fire, any who are sufferers thereby shall not be witnesses, though the verdict in one action could have no influence in another.

In an action against an innholder for goods stolen, the party himfelf cannot be a witness, though it may be he had no servant with him; per Eyre J.

In case for policy of insurance, the plaintiff at the trial produced the master to prove that the ship was taken by the French; obj. And the master being asked, said that he had another policy with another person on the same ship, and therefore it was insisted that he could be no witness, because a party interested, and so not competent to prove that the ship was taken; and on a Case made, it was resolved in B. R. that he was no witness; Parker Ch. J. said that he had put the Case to all the Judges, and they were of the same

opinion. Pafch. 11 Ann. B. R. Johnson v. Haydon.

42. The matter in iffue was, which was the charter by which the corporation of the town of Bewdly was to act; whether by the ancient one, or one of a later date? Evidence brought to establish the ancient charter was excepted against, as being a mortgagee under the old corporation, which they proved by an answer of his to a bill in Chancery. But this answer being fo uncertainly penned, as that it might be true, and yet his mortgage of fuch a nature, as not to prevent his evidence, it was infifted that he might be called to explain the ambiguity of his answer; and the Court was of opinion he might, fince his answer depended upon his veracity, as much as the evidence he could then give; and if the one be to be credited, why not the other? But afterwards his evidence was rejected upon another confideration, viz. That, in his answer, he lays the whole stress of his defence upon the matter then in iffue, viz. the fubfifting of the prefent corporation. 10 Mod. 151, 152. 12 Ann. B. R. Corporation of the Town of Bewdley.

43. On convicting a person unqualified for keeping a grey-hound before justices of peace, the informer cannot be a witness to prove the sact. Pasch. 12 Ann. B. R. the Queen v.

Cooper.

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44. Suppose one gives or promises a witness money if the cause go on that side, he cannot be admitted to give evidence; per Holt

Ch. J. 11 Mod. 228. Young v. Slaughter.

45. Plaintist brought an action of trover against defendant for lace, and produced one Floyer as a witness, upon which the defendant called one to prove that the plaintist's testatrix had declared that Floyer was her partner as a pawnbroker, but that it was not known, because she made use of him sometimes as an evidence; upon which Floyer was rejected, it being to enlarge the testatrix's estate. Vaughan, Executor of Hilton v. King, Ch. J. at Guildhall. Hill. 6 Geo.

46. One that had insured upon the same ship, though not to the same place, shall not be admitted an evidence, the ship being lost within the compass of that insurance, coram King Ch. J. Hill.

vac. 6 Geo. apud Guildhall.

47. Action by drawee on bill of exchange against the drawer for non-payment by the acceptor, defendant insisted that the acceptor was broke, and the plaintiff did not give him sufficient notice of it, by which he was damaged, which ought to be abated him in damages, and would have called the acceptor to prove this; but Prat Ch. J. would

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not allow him to be a witness, because, if the plaintiff recovered fmall damages against the defendant, the acceptor would have the benefit of it. Pasch. 8 Geo. Mitchel v. Conaway.

48. In action for fees a person was called who had a like demand upon defendant with plaintiff, but it being only to prove Earl Marshal's hand, and not to the merits of the demand, he was allowed

for that purpose. At nisi prius coram Pratt Ch. J. Mich. 8 Geo. 49. A grantee, where he appears to be a bare trustee, is a good witness to prove the execution of a deed to himself. Wms's. Rep.

290. Mich. 1715. in Case of Gos v. Tracey.

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50. In case of a prescription for a way through a gate to an acre of land in a common field, over defendant's part thereof near the gate. A person who had an interest in the field, and claimed a way through this gate into the common field to his part thereof, though as foon as the parties came within the gate some went one way some another, yet in regard this was a common interest to all the proprietors, as in case of a commoner, and the witness said, if this was stopt up at the gate it would be great inconvenience, he was fet aside; per Pratt Ch. J. at Westminster Sittings, Pasch. Vac. 1721.

51. A bare trustee is a good witness for his cestui que trust, but not an executor in trust, as he is liable to be fued by creditors, and to answer costs. 3 Wms's. Rep. 181. Pasch. 1733. Croft v. Pyke.

52. A. and B. were jointly committed in execution at the fuit of the crown. In an action brought against the warden for suffering A. to escape, B. was produced as a witness to prove the voluntary escape. It was objected, that this tended to discharge B. as against the warden, who could not detain him, having suffered A. who was jointly in execution with him to escape, and that therefore he was interested in the event of this suit; but it was answered, that a verdict in this cause could be no evidence in an action of false imprisonment, &c. to be brought against the warden, and the testimony of B. was received. Gibb. 80, 81. Trin. 2 & 3 Geo. 2. at the Sittings in the Exchequer, coram Pengelly Ch. B. The King v. Huggins.

53. Justice Powys declared, that it had been solemnly agreed by the judges, that where a person had a legacy given, and did release it, he was a good witness to prove the will, so if it was paid him in case of a pecuniary legacy; but if it was a specific legacy, though it was delivered to him, yet will not fuch be a witness, because if the will be fet afide, an action of trover would lie against such by

the administrator. Autumn Ass. at Brentwood 1720.

### (G) Witnesses. Who may be. Interested Persons, [ as Members of a Corporation Community, &c.

1. If one or 2 particular inhabitants of a town where all claim com- One combe witnesses for those sued, because it is in defence of their own dence to the VOL. XII. right

right of common in an action 174. pl. 4. Paich. 36

right and title which is one way or other decided by the event of this trial. So it is in case of a modus decimandi and the like; brought by wherein it is ordered many times per Cur. for avoiding unneanother; for ceffary multiplicity of fuits, that in one man's case a trial may be the right is had for all. Hob. 91, 92. Pasch. 14 Jac. in the Star Chamber, he swears a Ld. Howard v. Bell, where the tenants of a manor joined to detitle to him- fend a cause against their lord who supposed all their estates to felf. Skin. be void in law.

Car. 2. B. R. in Case of Sandys v. the Custom House Officers.

2. An action was brought by the corporation of the weavers of Norwich for a penalty against a weaver for working at his trade in harvest time. And Atkins J. allowed one of the corporation to be a witness though one moiety of the penalty was due to the corporation. Try. per Pais, 162. Lent Assizes 1657.

Ibid. cites the Case of East Green-

Affifes, 1713.

3. Upon evidence to a jury at a trial at bar, it was agreed that where the testator devised lands to W. R. for life, remainder to the wich S. P. minister and church-wardens of a parish for the maintenance of the poor for ever, any of the parishioners of the same parish may be a witness to prove this devise; 2 Sid. 109. Mich. 1658. B. R. Townfend v. Row.

> 4. Upon a trial at bar upon an iffue directed out of Chancery, whether all the manor of S. H. is within the county of Stafford; exception was taken to some witnesses who were produced to prove the manor house of S. H. to be in the county of Salop, because they were of that county themselves; but it was ruled, that any person of the county, if he is not within the hundred where this manor is, might be a witness; for as the county taxes, every hundred pays its proportion; but as to the hundreds there are particular charges. But it being proved afterwards that there was a general tax in each county for maintenance of the fuit, and therefore no one who was charged thereto may be a witness. Sid. 192. pl. 21. Pasch. 16 Car. 2. B. R. The County of Salop v. the County of Stafford.

And per King Ch. J. 5. On an information for a riot and mildemeanor in chusing a at Bodymn mayor, the cause was tried at bar, and no evidence was given against 2 of the defendants; and thereupon they were allowed to be fworn as witnesses for the other defendants, though it was objected that they feveral are were of the same corporation; and that they defended the fuit indicted for at their own charge, but this was not well proved. Sid. 237. a trefpals,

&c. and there is no Hill. 16 & 17 Car. B. R. The King v. Beder.

evidence against one of them he shall be admitted as an evidence for the rest. And in such Case Holt Ch. J. ordered a felon at the Old Baily to be brought from the bar, and to be evidence against persons indicted with him.

6. On evidence to a jury at bar in ejectment, the defendant challenged a witness produced by the plaintiff to prove a lease made [ 16 ] by the dean and fix residentiaries of Herford, under whom he claimed, because though the witness was a prebendary at large and a distinct body, yet as one of the general corps he had power to affent,

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bu CO which the Court held to be fufficient to fet him afide though he has no interest. 2 Keb. 126. pl. 79. Mich. 18 Car. 2. B. R. Smith v. Rawlins.

7. The defendants were feverally convicted of deer flealing upon the 3 and 4 W. 3. c. 10. Exception was taken to both the convictions because the persons upon whose testimonies the defendants were convicted appeared to be of the same parish where the facts were committed and fo might be entitled to part of the penalty, and confequently not indifferent and credible witnesses; but over-ruled per tot. Cur. because the justice of peace has averred them to be credible witnesses, and it does not appear that they were of the poor of the parish. Mich. 5 Geo. B. R. The King v. Wiford

and Savage.

8. In case on assumptet and indebitatus to pay toll of one halfpenny for every frail of raisins, and fourpence for every tun of oil &c. for which the city prescribed by the name of water bailage to be taken of all not freemen, that bring fuch wares by water to be fold to the city; on not guilty pleaded and trial at bar, Maynard excepted to a witness for the city, because a freeman; fed non allocatur; albeit he were disallowed for this cause in the Exchequer, because albeit the action be brought by the mayor and commonalty, the benefit being only to the sheriffs, the immunity of citizens is not in question. 2 Keb. 295. pl. 84. Mich. 19 Car. 2. B. R. Mayor and Commonalty of London v. Gold.

9. In an action against a hundred upon the statute of hue and 2 Keb. 713. cry fome house-keepers appeared as witnesses who faid they were poor pl. 92. Barand paid no taxes nor parish duties; but the Court taking the Hundred of opinion of C. B. held that they were not good witnesses because Stoke S. C. when the money recovered against the hundred should come to ruled acbe levied they might be worth fomething. Mod. 73. pl. 30. cordingly.

Mich. 22 Car. 2. B. R. Anon.

10. In a dispute about the toll of a market, the town pretending to be incorporated and to have a right to the toll, it was refolved that no burgh-holder can be a witness for the town;

Vent. 212. Pafch. 24 Car. 2. Anon.

11. In an action on the case against the town of Uxbridge for \* See tit. taking toll on Thursday market, it was faid no Uxbridge man of Trial (H.) the pretended corporation can be a witness,\* and so by Hale pl. 3. and the notes Ch. J. it was ruled in Case of the London Hawkers; and in there. Smith and Hancock's Case that no freeman could be allowed to prove the custom of this city that was of the corporation, 3 Keb. 12. pl. 16. Pafch. 24 Car. 2. Cook v. Baker.

12. In trespass the defendant justifies as servant to the mayor aldermen and commonalty of the city of London, governors of the hospital of Bridewell by patent 7 Ed. 6. The witnesses being most freemen of the city, Maynard the King's serjeant would not confent they should be sworn; and per Cur. in a quo warranto they could not be fworn, because each member is liable to the fine; but this being against Carter, and so a suit against them as another corporation, viz. governors of the hospital, this being in another

capacity and the action not in the right, the possession can be recovered against none but the defendant Carter, or fuch as are of the inhabitants of Bridewell, not against any freeman or citizen, as such, by Hale Ch. J. and Wylde; contra by Twifden and Rainsford; but to avoid this question, Jefferies for the city prayed time till next term, that in the mean time they might before the mayor of London in his Court at a common hall, as most usually, procure 17 ] a temporary disfranchifement of those witnesses that were freemen to enable them to be witnesses, which the Court granted. 3 Keb. 300. pl. 35. Pasch. 26 Car. 2. B. R. Lord Dorset v. Carter.

\* See tit. Trial (H) pl. 3. and the notes there.

13. Hale Ch. J. in \* Hancock's Case in the Exchequer, in a quo warranto against the city of London, it was agreed that none could be witnesses for the city of London against the Hawkers, until they were disfranchifed; for the evidence cannot furrender his franchise by consent, because the right was concerned, and every particular member liable to the fine, he cautioned them fo to do in this case of package, and so it was here in the case of waterbailage. 3 Keb. 295. pl. 26. Pafch. 26 Car. 2. B. R. Corporation of London v. .

Information 14. In case of water bailies claiming 2d. per chaldren for coals in nature of imported; all the judges (except Jones J.) held that freemen a quo warmight be witnesses. 2 Show. 47. pl. 33. Pasch. 31 Car. 2. B. R. ranto for taking 2 d. King v. Carpenter.

percha'dron for all sea coal imported at London. The defendants prescribed for the duty, and issue being taken upon the prescription, it was tried at bar. The defendants produced several citizens freemen of London, to prove the preseription; to whom it was objected, that they ought not to be witnesses, Quia in propria causa.—But per Cur. it appears, that the mayor and sheriffs have all the profit of the toll; so that though the benefit of the whole corporation touches all the citizens, and all freemen are members, yet they having no particular profit to themselves, they are lawful witnesses, for it shall not be intended that they would be partial and perjure themselves for so small and remote advantage. And the jury gave verdict for the desendants, Mic. 30 Car. 2. C. B. and per Scroggs Ch. J. it cannot be a general rule that members of corporations shall be admitted or refused to be witnesses in actions for or again, the corporations. But every case shall stand upon its own circumstances, to wit, if their interest be so valuable, as it can be presumed it may occasion partiality in them or not. 2 Lev. 221. Vent. 351. King v. City of London.

The Ld. K. North faid, that a corporation ought to have a town clerk, and under-clerks that are not freemen, that they may be competent witnesses, upon occasion. And he faid, he thought it very hard in the Cafe of Water Bailage of London, that no one freeman of the city, though it was not 6 d. concern to him, could be admitted as a witness. But there indeed the fac was in question. Vern. 254. pl. 246. Mich. 1684. Corporation of Sutton Coldfield v. Wilfon.

> 15. In case of a toll for a ferry, watermen have been allowed to be witnesses. Arg. 2 Show. 47. p. 33. Pasch. 31 Car. 2. B. R. King v Carpenter.

2 Jo. 116. · Court to tioned in the city, the parties agreed the

16. In case for procuring a false return to a mandamus, the de-8. C. fays, fendant produced several freemen of Canterbury to prove the return vice of the true; to which it was objected, they ought not to be admitted, being freemen of Canterbury, and a by-law was produced, by to the great which it was ordered, that the whole corporation should be at the heits occa- charges of the return. The defendant, to qualify these witnesses, produced a release he had given to the corporation of all contributions they were liable to on this account; and on much debate on a bill of exceptions all the Court held, that the witnesses matter (as ought to have been received. It was agreed, they were good witwitnesses. 2 Lev. 236. Hill. 30 & 31 Car. 2. B. R. Ensield v. he thinks) Hill.

3 Keb. 859. pl. 26. S. C. but S. P. does not appear.

17. In an indictment for not repairing Peterborough bridge; one of the county was admitted to be a witness. Cited per Dolben J.

Vent. 351. Mich. 32 Car. 2. B. R.

18. In case of duty or custom for goods imported, it was held, Vent. 351. that freemen citizens might be witnesses for the defendants; for the City of that is against themselves; and unfreemen likewise, that were London, not traders, were allowed likewise for the defendant. 2 Show. [ 18 ] 146. pl. 127. Mich. 32 Car. 2. B. R. City of London v. unfree concerning Merchants.

Water Bailage, S. P.

held accordingly, and feems to be S. C.

19. In information by attorney general at the relation &c. on behalf of themselves and all inhabitants of the town of Warwicke &c. relating to charities &c. a person an inhabitant receiving alms is no witness; for every inhabitant either pays or is under a possibility of paying to church, poor, &c. though he pays nothing at present. 13 May, 1737. per Ld. Chancellor at Westminster.

20. If A. B. C. D. and E. claim common in a place called Dale, exclusively of all other persons, and the common of A. comes in dispute; B. may be a witness to prove that A. has right of common there; because in effect it charges himself, viz. He admits another to have common with himself; but if the prescription be, that all the inhabitants of Blackacre ought to have common there, one of the inhabitants cannot be a witness to prove that another of the faid inhabitants ought to have common there; because in effect he would swear to give himself right of common there. Ruled by Holt Ch. J. at Lent Assizes at Winchester, 1697-8. Ld. Raym. Rep. 731. Hockley v. Lamb.

21. A fuit was for money given to the parishioners; none of the inhabitants ought to be witnesses; for in cases where the party was concerned in interest, though never so small, have always prevailed; and it was fo refolved in great debate in the Case of the City of London concerning the Water Bailiff; per Ld. Somers. 2 Vern. 318. pl. 305. Pasch. 1694. Dodswell v. Nott.

22. In all actions to be brought in the Courts at Westminster or at the affizes, for recovery of any fums of money mispent or taken by church-wardens or overfeers of the poor; the evidence of the parish-

oners other than fuch as receive alms shall be admitted.

23. I Anna cap. 10. Enacts that in informations and indictments in any Court of Record at Westminster or at the affises or quarter seffions, for not repairing their highways or bridges, the evidence of the inhabitants of the town or county, in which fuch decayed bridges or highways lie, Shall be admitted.

24. In all informations on indictments, for not repairing decayed bridges, bridges, and the highways adjoining in the Courts of Westminster, or at the affifes or quarter sessions of the peace; the evidence of the inhabitants of the town, corporation, county, riding or division, where such

decayed bridges or highways lie, shall be admitted.

25. One of the county is a good witness on a trial of an information against the inhabitants of a county, for not repairing a publie bridge, though he cannot be a good juror. 6 Mod. 307. Mich. 3 Ann. B. R. The Queen v. the Inhabitants of the County of Wilts.

The like City of London against the Hawkers. 3 Keb. 295. ter. 3 Keb. 300.

26. The company of fadlers brought debt upon the statute of was done in I Jac. 1. c. 22. f. 44. against the defendant; for that being a Case of the sadler he did make five hundred saddles unsufficiently, and unsubflantially, contra formam flatuti, and so became indebted to them in the forfeiture; this action being now brought for the penalty, three of the company were disfranchifed to be legal evidence, they deand in Cafe claring upon a voire dire, that they had no affurance of being reof I.d. Dor- ceived again. 6 Mod. 165. Pafch. 3 Ann. B. R. The Warden fet v. Car- and Company of Sadlers of London v. Jones.

27. Upon iffue joined upon a prescription for a toll; the defendant produced a witness; the plaintiff objected that he was 19 ] a freeman, and so interested; upon which the defendants produced a judgment in the Mayor's Court, whereupon a scire facias awarded, and two nihils returned, they had given judgment of his disfranchisement, but upon inquiry, the man faid he never was fummoned, and knew nothing of his disfranchifement; therefore the proceeding being irregular, Holt would not admit the man to be an evidence, because the judgment in the Mayor's Court may be avoided. 11 Mod. 225. pl. 20. Pasch. 8 Ann. B. R. Brown v. the Corporation of London.

28. And in this case it was likewise said, per Holt Ch. J. That a man who uses a way, may be an evidence, whether a toll has. been paid; and so in case of a nusance; but if he contributes any thing towards the carrying on the fuit, he cannot be an evidence. 11 Mod. 225. 8 Ann. Brown v. the Corporation of London.

29. In case of proving the bounds of a parish, if the parishioner is fo poor that he receives alms he may be a witness; so if he did not receive alms; yet if he did not contribute to the parish charges he might also be a witness, but if he paid he could not; per Justice Powys at Brentwood, Summer Affise, 1720. Said to be agreed by all the judges.

30. No one living in a hundred shall be allowed an evidence for any matter in favour of the hundred, though fo poor, as upon that account to be excused from the payment of the taxes; because though he be poor at present, he may become rich. 10 Mod. 150. Hill. 11 Ann. per Parker Ch. J. Queen v. Inhabitants of

Hornfey.

31. In an action against the hundred of North-Taunton, Devon, Lent Aff. 1715. Pratt J. faid, that it had been the opinion of all the judges upon a late confultation, that fuch poor inhabitants of

the hundred as did not contribute to the church, poor, &c.

might be good witneffes.

32. An action was brought by the corporation of the weavers of Norwich, for a penalty against a weaver for working at his trade in the harvest time, contrary to an ordinance by them made. And Atkins J. allowed one of the corporation to be a witness, though the moiety of the penalty was due to the corporation. Tr. per Pais, 7th edit. 329. fect. 1.

33. A freeman of Lynn was not allowed per Hale Ch. J. at Norfolk summer assises 1668, to be a witness to prove the custom of foreign bought and foreign fold in that town. Tr. per Pais, 163.

Harwich v. Twells.

34. An action of debt was brought, ummer affifes Suffolk 1669, by the town of Ipswich, for 501. a fine set upon one chosen common councilman (called their prime constable) for refusing to renounce the covenant, &c. and the town clerk (though a freeman) was allowed a witness to prove election, refusal, &c. and the fine fet which is for necessity, for that none other are, or ought to be present at those acts. Per Rainsford J. L. E. 67. pl. 43. cites

Tr. per Pais, 163.

35. In an action brought by a commoner for his right of common, another person that claims a right of common upon the same title shall not be allowed to give evidence, and yet it is certain he can neither get nor lose in that cause; for the event of the cause will no way determine his right; but though he is not interested in that cause, he is interested in the question upon which the cause depends, and that will be a biass upon his mind. It is not his fwearing the thing to be true that gives him any advantage, but it is the thing's being true; and the law does judge that it is not proper to admit a man to fwear them to be true, which it is plainly his interest should be true To Mod. 191. Hill. I Geo. I. B. R. in Cafe of Reeves v. Symonds.

36. A charity was given for cloathing fix poor perfons of the pa- [ 20 ] rish of A. Lord C. Parker would not fuster any of the inhabitants of A. to be witnesses, because they were interested, as being eased of the poor rates; and held, that a witness produced, being defcribed to be of the parish of A. yeoman, must be intended a house-keeper, and one liable to pay parish rates, unless the contrary be made appear. Wms's. Rep. 599, 600. Hill. 1719. Attorney-

General v. Weybourgh.

37. If a corporation will examine any of their members as wit- N. B. The neffes they must disfranchise them (and so the course is) and then method of they make use of their testimony; per L. C. Parker, Wms's. distraction they make use of their testimony; Rep. 595. Mich. 1719. Mayor and Aldermen of Colchefter.

formation in nature of a

quo warranto against the member, who confesses the information, and thereupon the plaintist has judgment to disfranchife him. Wras's. Rep. 596. in a note added at the end of the above Cafe.

38. On issue whether a custom for mortuary or not, at Rumsey in Hampshire, the inhabitants who received alms were admitted as witnesses at Winchester assises, Lent 1719. coram King Ch. J.

39. A burgefs of Bridport no witness in a cause where the question was concerning a duty for fetting up tubs to fell corn in, the defendant produced a lease from the corporation. In Trespasa at Dorchester assises 1719. coram King Ch. J.

#### (H) What Persons may be Witnesses. Judges, Jurymen, &c.

1. THE judge would not suffer a grand juryman to be pro-But ibid. the reporter duced as a witness, to swear what was given in evidence to makes a quære; for them, because he is sworn not to reveal the secrets of his compaif the wit- nions. Clayt. 84. pl. 14. 16 Car. before Foster J. Anon. ness is questioned for a false oath to the grand jury, how shall it be proved if some of the jury be not sworn in

> 2. Secretary Morris and Mr. Annelley, prefident of the council were both in commission for the trial of the prisoners, and fat upon the bench; and there being occasion to make use of their testimony against Hacker one of the prisoners, they both came off from the bench and were fworn and gave evidence, and did not go to the bench again during that man's trial, and it was agreed by the Court that they were good witnesses, though in commission, and might be made use of. Kelynge 12.

3. When a juryman was hearing evidence with his companions, was fworn to give evidence upon prayer of defendant's 1750. B.R. counsel, and he gave evidence publicly to his companions, and yet continued of the jury. Sid. 133. in a Nota at pl. 3. Pasch. 15 Car. 2. B. R.

> 4. The jury may go upon evidence of their own personal knowledge, being returned de vicineto; per Vaughan Ch. J. Vaugh. 147. in Bushell's Case.

5. On a trial at bar in B. R. in ejectment, whether there was a proper and good tenant to the pracipe to a common recovery suffered in Mich. term; a bargain and fale was produced dated before that term but in fact executed afterwards; it was proposed to prove this by Mr. Knight an attorney, against whom it was objected for ] that he was an attorney in the cause, and he ought not be examined to discover the secrets of his clients; but it was ruled that it was the privilege of the client and not the attorney, not to be examined, for where a counsel or attorney is intrusted by his client, and his fecrets are discovered to him, he receives them under a trust of fecrecy which he is not to break, neither ought he to affift the other party; so that what the client tells him, he shall not go and discover; but the question here is, when the deed was executed, and whether by the party or not, for he was concerned in passing this recovery, and he present at the execution of the deed; it is an act of his own knowledge, he is to testify and shew the truth only concerning this deed, and any one might know this as well

S. P. per Cur. Sty. 233. Mich. Bennet v. Hundred of Hartford.

fuch Cafe ?

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as an attorney. Knight being examined faid, the deed was executed about the latter end of February, or the beginning of March. 10 Mod. 40. Mich. 10 Ann. B. R. Ld. Say and Seal's Cafe,

### (I) Witnesses. Who. Parties.

1. In affise one of the witnesses was challenged, because he was named disseisor et non allocatur; for he is not sworn upon the seisin and disseisin, but upon the deed, and therefore was sworn, and yet his saying to the deed may excuse the tenant of the disseisn; and it was said, that all the witnesses may be named in the writ. And per Cur. witnesses shall not be challenged. Br. Testimoignes, pl. 8. cites 12 Ass. 12.

2. In affize deed was denied, and witnesses were named, one of whom was fworn, notwithstanding that he was named in the writ as a disseisor, and notwithstanding that he had purchased the demesse pending the writ. Br. Testimoignes, pl. 9. cites 12

Aff. 41.

3. If one has cause of action against J. S. and brings action against J. and several others against whom he has no cause of action, and this is by cover, to take away their testimony, and it appears upon evidence to be so, it was held per Cur. that the justices may and ought to receive their testimony; and so it was done in this Court, in the Case of one Dymoke and others. Sav. 34. pl. 81.

Mich. 24. and 25 Eliz.

4. Nota; by Fleming Ch. J. and the whole Court, in a trial at the bar, where exception was taken against a witness, to prove the execution of a deed of feoffment by livery and seisin, whereby the case was, A feoffment in see was made to the use of J. S. and two witnesses were subscribed to prove the livery of seisin; and afterwards one of the witnesses had an estate at will made unto him of part of this land, and he being produced to witness the execution of the feoffment by livery and seisin, was excepted against, because he was now a party interested in part of the land, and so his oath was to make his own estate good, but notwithstanding the exception was disallowed by the whole Court; and it was resolved, that he might well be sworn as a lawful witness to prove the executing a feossment by livery and seisin, the Case being in assistance of the feossment. Bulst. 202. Pasch. 10 Jac. Anon.

5. Two are fued, but at the affifes the plaintiff proceeds against one only; in such case, he against whom the plaintiff surceases his suit may be allowed a witness in the cause. Godb. 326.pl. 418.

Pafen. 21 Jac. B. R. Anon.

7. In trespass against A. fimul cum B. and C.—B. and C. are [ 22 ] admittable as witnesses, if the plaintiss has not arrested them, or at the most demanded process of the sheriss to do it. Tr. per Pais, 335.7th edit. 335. cites Hill. 1651. coram Roll.

8. De-

8. Defendants against whom no evidence is, allowed to be witnesses, and sworn. Sid. 237. pl. 4. Hill. 16 & 17 Car. 2. King v. Bedder. As in action of trespass brought against A. simul cum B. and C. if nothing be proved against B. and C. B. and C. may be examined as witnesses in the cause; per Cur. Sty. 401. Hill. 1654. B. R. Page v. Cook.—Clayt. 37. Creswick's Case.

9. In trespass and ejectment by F. against S. exception was taken against a witness produced to prove the lease of ejectment, because he had the inheritance of the lands leased; but it was for the plaintiff that the defendant claimed under the same person that the plaintiff did, and therefore the witness was admitted to be

fworn. Sty. 482. Trin. 1655. B. R. Fox v. Swann.

and one comes in upon the exigent, there may be a new original brought against the other finul cum, and those that are waved may be witnesses in the cause; but those who are declared against with a simul cum, cannot be witnesses; per Roll Ch. J. Sty. 404. Hill. 1654. Anon.

by the son on marriage upon agreement made by the father, the father may be a witness, although he also might have had the bill or action; by Maynard the King's Serjeant (and which was agreed by all the bar) in Chancery. Keb. 335. pl. 6. Mich. 14 Car. 2.

in the Case of Gee v. Spencer.

12. If an action is brought against two, and no evidence is given against one, he may be a witness himself in the Case; per Twisden and Windham. Tr. per Pais, 7th edit. 334. cites Mich.

19 Car. B. R.

13. In trover, by affignce of commissioners of bankrupts, the defendant excepted to a witness because he was a creditor, and may come in before a division made; but after four months after any dividend made, be is a good witness; for no other dividend shall be intended; but here, ho division being made, he was set aside. 2 Keb. 348. pl. 31. Pasch. 20 Car. 2. B. R. Bents v. Mico.

14. In an ejectment of a rectory, the grantee of the next avoidance was not admitted to prove a grant of the next avoidance, although his interest was executed by presentment, though said that assignor of a lease might be sworn a witness to the assignment of a lease, where there were no covenants. Vent. 15. Pasch. 21 Car. 2.

in Cafe of Heath v. Pryn.

15. It was moved, that a person named in the simul cum might be struck out, he being a material witness, and it was granted. And Keeling said, that is nothing was proved against him, he might be a witness for the desendant. Mod. 11. pl. 33. Mich. 21 Car. 2. B. R. Anon.

16. On an information upon the flatute of usury, he who borrows the money may be a witness after he hath paid the money, but not before; cited Raym. 191. by Twisden J. to have been resolved in one Long's Case.

17. If

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- 17. If a man be named defendant who is proper to be witness in the cause, the plaintiff must by order strike out his name before answer; but after answer he may by order examine him as a witness, though his name be not struck out of the bill, if he be otherwise competent, as if he disclaims, or has no interest, or only as a [ 23 ] trustee. 2 Chan. Cases, 214. in a nota, Hill. 27 & 28 Car. 2. in Canc. Anon.
- 18. In trefpass against several defendants, whereof one who was a witness for the plaintiff, was made a defendant by mistake, and so he continued till iffue joined; and then upon a motion, his name was omitted to the intent that he might be a witness. Sid. 441. pl. 11. Hill. 21 & 22 Car. 2. B. R. Anon.

20. In debt against an heir upon an obligation, made by his anceftor and J. S. jointly and feverally; J. S. was from as a wit-

ness for the plaintiff. Try. per Pais, 7 edit. 334.

21. A co-plaintiff, though but a truffee, cannot be examined as a witness for the other plaintiff. But if the plaintiff had made the trustee a defendant to his bill, then the trust had been upon oath; whereas now it was only alleged in that bill; then the co-plaintiff disclaiming all interest upon oath, might have been a good witness. Vern. 230. Hill. 1683. pl. 225. in a nota in the Case of Phillips v. the Duke of Bucks.

22. Nurse was examined as a witness, though plaintiff to prove fervice of a decree; and on debate, the deposition allowed, and ruled that the plaintiff's oath was sufficient to convict the defendant of a contempt, unless the defendant swears quite contrary, and on exception to a Master's report, the defendant was found in contempt. 2 Freem. Rep. 132. pl. 159. Pasch. 1692. in Curia Canc. Nurse v. Guillem.

23. A creditor was admitted by Holt Ch. J. to prove his bond, and the debt due upon it, upon plene administravit pleaded, he having before received it of the administrator, and delivered up the bond. Ld. Raym. Rep. 745. Pafch. 8 W. 3. at Guildhall. Kingston

v. Grey.

24. An action was brought upon a contract of matrimony, and But Treby a verdict given afterwards upon an information of forgery, the con- Ch. J. betracted woman was fworn as a witness for the King against the a fecond plaintiff, in the action which Holt Ch. J. faid she ought not to trial was have been, to avoid her own contract, and therefore inclined to had, faid grant a new trial; for he faid he was not fatisfied that a person he paid deinterested can be evidence in any case though in a criminal mat- ference to Comb. 360. Pafch. 8 W. 3. B. R. The King v. Dean.

the judgment of B.

opinion was that the man and his wife were good evidence though they were interested, and this as well as in case of an action upon the statute of Winton, or in an indictment on the now statute of clipping, the party who is to get by the conviction, may be evidence against the criminal. MSS. Rep. Dean v. Willis.

25. If A. gives bond to B. conditioned to pay all the money due from C. to B. in this case C. is a good witness to prove what is due. Lutw. 663. 665. Pasch. 9 W. 3. Ladd v. Garrard.

26. In-

12 Mod. 338, 339. the King v. of the Ficet, S. C. held accordingly.

26. Inquisition upon a special commission out of Chancery. found that Ford had committed 5 voluntary escapes, he traversed the Warden this inquisition, and upon the trial one who was suffered to escape (but was returned to the prison) was produced as a witness, it was objected, that this was to fave his own bond which he had given to be a true prisoner, and would intitle him to an action of false imprisonment against the marshal, and compared it to the case of an usurious bond. But per Cur. the bond is collateral to the escape, and the consequence of his evidence as to that bond is 24 ] not material to disable him from being a witness. And this is a matter privately transacted between the party and the officer, of which no one evidence can be, and it is not like the cafe of usury, for that makes the bond void. 2 Salk. 690. pl. 3. Mich. 12 W. 3. B. R. the King v. Ford.

27. Information for building locks on the river Thames, and it is no exception to a witness here that he contributes to carry on the fuit, or that this public nuifance was to bis private nuifance.

12 Mod. 615. Hill. 13 W. 3. Dom. Rex v. Clark.

In case of an indictment for battery, he that was

28. In indictment for oppression, battery, &c. the party oppressed may be a witness; per Holt Ch. J. 12 Mod. 512. Pasch. 13 W. 3.

beaten may be a witness, because he can reap no benefit by the verdict in another suit, and the cause is of small moment. Hard. 331. Trin. 15 Car. 2, in Scacc. per Cur. in Watts's Case.

> 29. In case for rescuing a person arrested on mean process at the plaintiff's fuit. The party rescued appeared and was sworn as a witness for the defendant, not being made party to the action; which Holt Ch. J. hæsitanter allowed, because he swore to charge himself, if by his evidence he discharged the defendant; but faid it was what he never had feen before, and that if the defendant was guilty of the rescouse, he could not but be particeps criminis. However he was fworn, and his credit left with the jury. 6 Mod. 211. Trin. 3 Ann. B. R. Wilson v. Garv.

> 30. If a man unnecessarily makes any one a defendant, he thereby cuts himself off from the benefit of his evidence, it being his own fault. But where several are made defendants, it will not hinder any one of the defendants from the benefit of any others that are made fo. Indeed in case of trustees it is necessary that they be made defendants, and therefore there the plaintiff may have benefit of the evidence. 10 Mod. 19, 20. Pasch. 10 Ann. in Canc. Obiter, in Case of Gibson v. Albert.

Gilb. Fqu. Rep. 93. S. C. and S. P. by Mr. Vernon .- Robins's Equ. Abr. 225. pl. 8. S. C.

32. A plaintiff in a cause cannot be examined as a witness, because if the cause miscarries, the plaintiffs are liable to costs. But a defendant may, because he is forced into the cause and otherwife a man might be deprived of all his evidence by their being made defendants. Ch. Prec. 411. pl. 277. Mich. 1715. Sic dictum fuit, in Case of Casy v. Beachfield.

& S. P. agreed per Cur. in Canc. '

33. On a wager on a cock-match, none of those who betted on either But at York fide, shall be admitted witnesses to prove which cock won the Coram Trabattle. Wells Sum. 1710. Baron v. Bury.

cy J. Wagerers at

horse race having received their sums won, on supposition that the race was won by the side they betted, were admitted to give evidence about the same horse race.

34. On a trial at Bodmyn, coram Montague B. against a common carrier, a question arose about the things in a box, and he declared that this was one of these cases, where the party himself might be a witness, propter necessitatem rei. For every one did

not shew what he put into his box.

35. Action against a carrier going between Exeter and London, [ 25 for the loss of a box, in which were several sorts of goods belonging to the servant the plaintiff a London wholesale man, who used Exeter fair. produced as On the trial a difficulty arose on the proof of the quantity, i. e. a witness, yards, &c. as well as the value of feveral stuffs packed up in the could not box. \* The witnesses not coming up to an exact and full proof count of the thereof, the goods unfold and returned to London, being ufually put measure of up with the shop marks on them as was customary in such cases, &c. every piece These were affixed partly by plaintiff, and partly by others; to of ftuff, that which it was answered, that what the plaintiff himself did at some unfold, yet distance of time, not with the view of this action, or of what their entries happened afterwards, was of weight in this Cafe and fome fort of what remained, tho' evidence, because here was no colour of fraud or deceit, and act not actually of the plaintiff under these circumstances, though in his own af- measured. fair is sufficient to fix the quantity of these stuffs from the marks, was allowed, because &c. whereupon the Jury found per quer. Summer Assize, Exon, the manner coram Eyre J. 1719. v. Berry.

doing the thing was to

be regarded, though no politive proof, yet could be no fraud at the time of packing up the goods. Per Eyre J. Affize Exon.

36. Banker, broker or fervant, the same as a factor; S. bought 8. S. flock, 500l. at 800l. per cent. and took it in the name of Rogers, and afterwards he defired R. to fell it again, which he did do to one G. at 7701. per cent. but G. put off his accepting it from time to time (the contract being 12 Sept.) to 2d Nov. when R. fold it to another for 2001. per cent. and the difference being 2805l. was given in damages on an action upon this contract against G. Objection at the trial, that R. was no witness. adly. That the action could not be brought in the name of S. the stock being R's in the point of law. Per Cur. R. is a good witness, because he is no way concerned in the event or consequence of the question, nor any wife affected. Pasch. 7 Geo. B. R. 87. Scooling v. Gampire. Coram Prat Ch. J. at Guildhall Sittings, & postea moved in Court, R. did not take any notice of S. at the time of the contract. A factor who makes a contract in his own name for the benefit of the principal, it is by authority from him, and in law it is the contract of the principal. This is a stronger case than that of a Blackwell factor, because he is to

have commission-money out of what is recovered. Factors from the nature of the thing as servants, it is necessary to tell who is the owner, and to him that buys is all one. Every man may employ his friend or his neighbour; every one that transacts is for that purpose a factor. He that draws a bill of exchange is a merchant for that purpose. R. had no demand or interest in

question.

37. On a trial concerning the construction of a borough, whether any person can be elected into the common council, but those who are inhabitants and hold burgage tenures; one who comes within both these qualifications is no witness to prove the constitution. But then one Mr. Lee was produced as a witness for the defendants to prove it, who was an inhabitant of the borough, but it was admitted he had no burgage tenure; whereupon he was allowed by the Court to be a good witness, as to the right fixing in such as had held burgage, and also were inhabitants, since he did not attempt to establish the right in the inhabitants only. 2 Ld. Raym. Rep. 1353. East. 10 Geo. Stevenson v. Nevison.

38. Case against a pilot, for a neglect of his servant in not carefully piloting a ship over the bar of Exmouth contrary to his undertaking; the servant was admitted to be a witness for his master.

of a waggon Coram Eyre Ch. B. apud castr. Ex. Sum. Ass. 1724.

was admitted to be a witness for his master, in an action against the master for overturning the waggon, and breaking a woman's arm.

[ 26 ] 39. A party ought not to be examined, though by confent, unless the whole matter be put to his oath. MSS. Tab. March 23,

1723. Charteris v. Earl Hyndford.

40. Information on late gaming act granted by Court of King's Bench, and tried at Wells summer assizes, 1735, coram Fortesque J. The loser who was under twenty-one at the time of loss, was admitted an evidence to prove the fact, and asterwards on motion in arrest of judgment, the Court of B. R. were of the same opinion.

# (K) Witnesses. Who. Interested Person. Party himself, in Case of Necessity.

Vent. 49. Parris's Cafe. S. C. held accordingly.

And coram

Winchester,

eodem at

1. In an information for procuring J. S. fraudulenter & deceptively, to give a warrant of attorney to confess a judgment; J. S. was admitted a witness by three justices against Twisden J. the suit being for the King. Vent. 49. Mich. 21 Car. 2. B. R. Parry's Case, and the judgment was set aside. Sid. 431. pl. 20. King v. Paris & al.

2. An action of debt was brought summer assizes Susfolk, 1669, by the town of Ipswich, for 50l. a fine set upon one chosen common council-man (called their prime constable) for refusing to renounce the covenant, &c. and the town clerk (though a freeman)

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taken, is

was allowed a witness to prove election, refusal, &c. the fine set, which is, for necessity, for that none other are, or ought to be prefent at those acts: per Rainsford J. L. E. 67. pl. 43. cites T. per

Pais, 163.

3. If an indictment be against a man for not repairing a bridge, that is a public bridge, and which he is bound to repair, ratione tenuræ, it was received that in fuch cases, persons of the county are allowed to be witnesses; because none else can testify. 2 Show. 47. pl. 33. Pasch. 31 Car. 2. B. R. King v. Carpenter. Cro. C. 361.

4. Woman taken arway by force, was allowed to be a witness as And the to her being taken. 4 Mod. 8. Hill. 2 W. & M. in B. R. King marrying of her, for

and Queen v. Fezet.

within the statute and judgment, that the defendants should be hanged. Cro. C. 482. 484. 488. & 492. pl. 18. Mich. 13 Car. B. R. Fulwood v. Bowen.

5. Where a man is interested in the consequence of that which he fwears for, if it be so that the doing the lift which he is by his evidence to invalidate or fet afide, was a means to obtain his liberty or an exemption from corporal punishment; he shall be a witness, as in the case of dures, (though it be to set aside his own bond) yet it being given to obtain his liberty, he shall be a witness; also where the nature of the thing admits no other evidence, as if a woman give a note or bond to a man, to procure her the love of ]. S. by some spell or charm, in an indictment for the cheat, though it tends to avoid the note, yet she shall be a witness; per Holt at nisi prius. 7 Mod. 119. Mich. 1 Ann. B. R. Queen v. Sewel al. Beaus.

6. In Cafe by a filk dyer against his servant, for money received to his use; upon evidence it appeared, that A. sending silk to be died by the plaintiff, the plaintiff fent his fervant, the defendant home with it, and A. paid him for every parcel as he received it; A. was produced as an evidence, that he paid the money to the defendant; but Holt would not admit his evidence, for that would be to admit a creditor [debtor] to fwear in discharge of him. 11 Mod. [ 261. pl. 19. Mich. 8 Ann. B. R. Tybbald v. Tregott.

7. And he faid, that if a man pays money by his fervant, the fervant may be a witness; but that is allowed for the necessity of the

thing. 11 Mod. 261. Tybbald v. Tregott.

#### (L) Witnesses. Who. Parties to Frauds.

I. I F I employ a person to fell wool, or other goods for me, and he fells them in his name, and as his own goods; yet in an action brought in my name for the money, the perion employed may be a witness. Ex. Lam. 1706. .

2. A bankrupt having released and assigned all his estate to the assignees, may be examined as a witness for them to prove a

fraudu-

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fraudulent sale by himself to another; per Cowper C. 2. Veril. 637. pl. 565. Hill. 1708. Phillips & al. v. Wilcox & al.

# (M) Witnesses. Disabled, by Crimes.

Skin. 578.

S. C.—

S. Mod. 15.

Mich. 11 Jac. Brown v. Crashaw.—Raym. 369. Collier's Case, and Dangersield was admitted an evidence.—And S. P. in the King v.

Warden of the Fleet.

2. There is a difference where the disability is only the confequence, and where it is part of the judgment itself. In the first case, the King may pardon it, but in the second case, the King's pardon will not take away the disability. Therefore, if a man be convict of perjury on the statute, the King's pardon will not restore, for it is not a consequence, but part of the judgment, quod in posterum non sit receptus ac testis. Pl. Co. Ent. 368. But a pardon by act of parliament will restore him, even in that case. Quære of a perjury at common law, and if the law be the same, for these the disability is only the consequence, and no part of the judgment; otherwise if a jury be convict in attaint. Rast. 86. a. cited 2 Salk. 689. Pasch. 7 W. 3. B. R. King v. Crosby.

3. A person convict of perjury upon the statute, and pardoned, cannot be a witness, for the punishment is part of the judgment, appointed by the statute; contra of a conviction at common law, for there it is only a consequential disability; therefore in the latter case, the King may pardon, and that restores him to his testimony; but in the sormer case, he must reverse the judgment, or he cannot be restored; per Cur. 2 Salk. 514. Mich.

9 W. 3. B. R. in Case of the King v. Grepe.

4. A bare conviction of perjury, would take away one's evidence; because it is an infamous crime, not so of barratry, which was not of an infamous nature, without an infamous punishment were inflicted, as the pillory, &c. arg. But the whole Court held contra, and that it was not the nature of the punishment, but the nature of the crime, and the conviction thereof, that created the infamy; and per Holt Ch. J. if one be convicted of perjury on the statute, he cannot be restored to his credit by the King's pardon; for by the statute, it is part of the judgment that he be infamous, and lose his credit, but he may be restored to his credit by a statute pardon; but in indictments of perjury, at common law, the infamy is only the consequence of the judgment; and therefore the King's pardon, in such cases, restores the party to his credit; held upon a trial at bar. 2 Salk. 690, 691. pl. 3. Mich. 12 W. 3. B. R. in Case of the King v. Ford.

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5. By Roll Ch. J. one that has been burned in the hand, for The burning felony, may notwithstanding be a witness in a cause; for he is in in the hand, does not a capacity to purchase lands, and his fault is purged by his pu- make the nishment. Cites Sty. 388. Mich. 1753. Anon.

famous, &c.

standing in the pillory, &c. does, because it comes instead of purgation at the common law, which supposeth he might be not guilty, notwithstanding the verdict; per Hyde Ch. J. Kelynge and Wilde, Recorder. Kelynge 37, 38.

6. If a person produced as a witness has been perjured, although no judgment is entered against him (it being in the Protector's time, all whose proceedings were discontinued by alteration of the Government), yet evidence to prove him perjured may be given viva voce. 1 Sid. 51. pl. 16. Mich. 13 Car. 2. B. R. Wicks v. Smalbroke.

7. In evidence upon a trial at bar, it appeared that one Alcot. one of the witnesses for the defendant, was before indicted of perjury in the time of Cromwell, and verdict against him; but by the death of Cromwell judgment was not entered, but all proceedings vacated; and now the counsel of the plaintiff would offer this verdict in evidence to weaken the credit of the witness; but refolved by the Court, that the faid verdict is now totally destroyed, and cannot be given in evidence. Raym. 32. Mich. 13 Car. 2. B. R. Fitch v. Smalbrook.

8. In evidence on information of perjury it was observed, that one indicted of perjury may be a witness in the same point upon trial betwixt others till conviction. Keb. 289. pl. 102. Pafch. 14 Car. 2. B. R. in Case of the King v. Dawson; cites it as Sir Edward Powell's Cafe.

9. Hawkins having a great personal estate, and being a prisoner in Newgate for opprobrious words of the Lord Mayor of London, and a little diffurbed in his mind, made his will, attefted by feveral witnesses; and upon hearing the cause in the Prerogative-Court, fentence was given against the will, and upon an appeal to the delegates, two records were produced to avoid the testimony of two witnesses to the will, by which it appeared, that one of them was convicted for a libel, and the other for finging a ballad against the government, and both of them adjudged to the pillory, but no proof that they flood in it; after these witnesses were examined in the Spiritual Court, and before sentence given, there came a general pardon, by which they were pardoned; and the question now was, whether their depositions taken in the Spiritual Court thall be admitted for evidence: it was agreed, that if their testimony was not good at the time when it was taken, the fubfequent pardon would not make it good, and that the judgment of pillory makes the infamy, though never executed; but the chief queltion was, whether the judgment for these crimes should make them infamous, because (as itowas objected) it is not from the judgment, but from the nature of the crimes for which the offenders are convicted, that the infamy arises, as for such crimes as import deceit and VOL. XII.

fraud, or cheats, &c. And if one is convicted of cheating, yet he may be a witness, if he has not judgment of pillory for it. And though pillory infers infamy at the common law, yet it imports no fuch thing either by the canon or civil law, unless the cause for which it is inflicted is infamous, and it is by these laws that this case (being concerning a will) is to be determined, therefore the matter for which thefe witnesses were convicted, being not infamous, either by the canon or civil law, though they had judgment for the pillory, their depositions were admitted for evidence, and the fentence in the Prerogative-Court reversed, and the will fentenced to be good. 3 Lev. 426. Trin. 7 Will. 3. before the delegates at Serjeant's-Inn in Fleet-street, Chater v. Hawkins, &c.

I. E. 47. pl. 17 to 20.

The burn-

hand was

10. If after hearing a witness is convict of perjury, you may take advantage of it on a rehearing; per Holt Ch. J. 2 Vern.

464. pl. 424. Mich. 1704. Needham v. Smith.

11. 57 Eliz. cap. 9. fect. 5. No perfon being convicted of corruptly procuring any witness to commit wilful perjury shall be received as a witness, and sworn in any Court of record, until the judgment given against him be reversed; and, upon every such reversal, the party grieved to recover his damages against the person who procured such judgment.

# (O) Witnesses. Disabled, or not.

### By Crimes of a lower Sort.

1. MEN that are branded with infamy that they cannot be jurors, cannot be witneffes; yet per Glyn Ch. J. and Newdegate J. Mich. 1657. B. R. Conviction of common barratry does not hinder from being a witness; but Maynard Serj. held strongly against

it. Tr. per Pais, 160. Anon.

2. In respect of a person that had been burnt in the hand, if it were for manslaughter, and after pardoned, it were no objection to his credit, for it was an accident which did not denote an ill habit of mind; but secus if it were for slealing, for that would be a great objection to his credit even after pardon, but the record of conviction ought to be produced. 12 Mod. 341. Mich. 3 W. 3. King against Warden of the Fleet.

3. One that has been burnt in the hand for a felony may be a ing in the witness, for he is in a capacity to purchase lands, and his fault is quan statute purged by his punishment; per Roll Ch. J. Mich. 1653. Lord

pardon as to Castlemain's Case, as to the testimony of Dangerfield. the felony,

and as to that he was a good witness. Raym. 380. Trin. 32 Car. 2, B. R. & C. B. Hob. 283. 292. &c. per Mobert Ch. J. Trin. 26 Jac. Searl v. Williams.

4. A witness was convict of barretry, and the record produced,

but the judgment was, to be fined 500 merks, and to stand in the pillory. It was argued, that a bare conviction of perjury would take away one's evidence, because it is an infamous crime, but not so of barretry, which was not of an infamous nature, without an infamous punishment, as the pillory. But Curia contra, that he is disabled by the conviction; for it is not the nature of the punishment, but the nature of the crime, and conviction that creates the infamy, 2 Salk. 690. pl. 3. Mich. 12 W. 3. B. R. the second resolution, in Case of the King v. Ford.

5. A conviction of barretry renders a man infamous, and inca- [ 30 ] pable of being a witness, but a general pardon will restore him.

3 Salk. 264. pl. 1. Mich. 12 W. 3. King v. Weedon.

# (P) Witnesses. Disabled by not concurring with the Laws.

I. A N outlawed person shall not be faid to be probus & legalis 2 Hawk. Pl. C. cap. homo, L. E. 48. pl. 23. cites 33 H. 6. 32 & 33 H. 6. 55. 46. f. 21. [But as to this I do not find it there. It concerns jurors and not fol. 433. witnesses.]

day, that outlawry in a personal action is not a good exception against a witness, as it is against a juror.

2. A Popish recusant convicted is no witness, for by 3 Jac. cap. 5. he is to be excommunicated and taken as such, wherefore a suggestion in a prohibition being proved only by two recusants convicted, a consultation was granted. 2 Bulst. 154.

Mich. 11 Jac. Brown v. Crashaw.

3. The motion was for an attachment for extortion and the affirmation of a Quaker was offered to be read, which was opposed, and the Case of the King v. Wich was cited, where it was refused in case of an information; but on the contrary was cited, Pasch. 5 Geo. 2. Powel v. Ward. Where a difference was made between an attachment and an information; that in the latter an affirmation is not to be allowed, but that in the former it may, Lee Ch. J. cited a Case where on a motion for an attachment, for not obeying an award, an affirmation was resused. The Court held it to be a point of great consequence, as to the construction of the statute of W. 3. of Quakers, and desired it might be argued; but at last it was read by consent, and so it remains undetermined. Pasch. 11 Geo. 2. B. R. The King v. Bell.

# (Q) Witnesses Disabled.

#### From, or at what Time.

1. ONE indicted of perjury may before conviction be admitted a witness on the same point, in a trial between others. I Keb. 280. pl. 102. Pasch. 14 Car. 2. B. R. The King v. Dawson.

2. If after hearing a witness is convict of perjury, you may take advantage of it on a rehearing. 2 Vern. 464. pl. 424. Mich. 1704. Needham v. Smith.

#### [ 31 ]

# (R) Witnesses. Disabled by Interest.

### Enabled by some After-Act.

Keb. 134. Fitch. Small book.

And it is

release in

I. I F a witness has part of the land in question, and he fells or disposes of it after his coming to London, or at any time after he has notice of the trial, he shall not be admitted even though he fold it, bona fide, and for a valuable confideration. Sid. 51. pl. 16. Mich. 13 Car. 2. B. R. Wicks v. Smalbrook.

2. So though he himself is not occupier of the land, nor has been fince the writ purchased, but another by his commandment, the Court will not admit his testimony; because if the verdict be against his title, he that occupies by his commandment may charge him in action upon the case. Sid. 51. Wicks v. Smalbrook.

3. A father offered to testify a deed in pursuance and affirmance of a leafe made to his fon by himself, which the Court allowed, bis interest being passed away. L. E. 74. pl. 61. cites 1 Keb. 280. pl. 80. Pasch. 14 Car. 2. B. R. Jay v. Rider. Vide Sid. 75.

4. Legatee or devisee of an annuity may be a witness to prove fufficient if the will, if he has received it or released his annuity, and this though it be after the action commenced, at any time before Court, while examination; fo of a truflee, or if one be in possession as servant. the Cause is Sid. 315. pl. 33. Mich. 18 Car. 2. B. R. Stephens v. Gerard. crying. Ibid.

-2 Keb. 128. pl. 82. S. C. held accordingly; and cited Ld. Willoughby's Cafe, where a witness was admitted to prove a codicil of the Ld. Rutland's will upon a release of his interest made while the jury were at the bar.

> 5. In a trial at bar in ejectment, the defendant claimed under a will, and offered to prove the publication of it by B. and exception was taken to his evidence; because he was a legatee, and also had an annuity given him by the will in question, which was confessed; but to enable him to be a witness, an acquittance was produced of the legacy and a release of the annuity, and the money was proved to be paid for both; to which it was objected, that all

this

this was done pending the action, which objection proved to be false; but per Cur. if it had been pending the action, yet he shall be admitted as a witness. L. E. 65. pl. 39. cites 2 Sid. 315. Mich. 18 Car. 2. B. R. Stevens v. Gerard.

6. And it has been adjudged that if a release had been sealed in Court whilst the cause was trying, that the releasor should be admitted as a good evidence. L. E. pl. 39. cites 2 Sid. 315. S. C.

7. On the evidence at a trial at bar, it appeared that the bufband of the mother of the infants legatees in the will of Michel, took bond of double the fums to be paid when the plaintiff heir at law did enjoy the lands in question against the will; which per Cur. is to the testimony of the mother, and not only to her credit; and though it were released, yet this being a champertuous interest created by the party, the release doth not enable her to be a witness, as on a release of legacy it would; that is created by act in law, but by consent she was sworn. L. E. 65. pl. 38. cites 3 Keb. 75. pl. 19. Mich. 24 Car. 2. B. R. Turnstall, lessor of Greve, and Grathooke.

8. Upon a motion in account judgment was had against defendant quod computet. The point was, if the bail should be allowed as evidence for him in Chancery, because he swears to discharge himself if the plaintist prove insolvent. The order was by consent that the defendant (now plaintist) putting in another bail, the then bail should be allowed as evidence as far as by law he may. Fin. R. 247. Mich. 28 Car. 2. Calsham v. Spatman.

9. S. had laid himself to be sole proprietor of a ship and tackle, &c. and the witness swore at the time of the action brought, that he was equally concerned in every thing, but long since had sold his interest, so that now he was not one farthing concerned in the consequence of the cause; yet the Court held, that he was no competent witness. Skin. 174. pl. Pasch. 36 Car. 2. B. R. Sandys v. Custom-House Officers.

10. Perjury is no more infamous now than it was at common law; the difference is only that where H. is convicted on the flatute that is part of the judgment to be difabled, but at common law it is only a confequential difability; therefore in the last case the King may pardon, and that restores him to his testimony, but otherwise in the former; for in the Case he must reverse the judgment, or cannot be restored. 2 Salk. 514. Mich. 9 W. 3. B. R. in Case of the King v. Greepe.

11. Original drawer was offered as an evidence, in an action upon a bill of exchange to prove that he did not draw the bill, was denied, because at last the burden must fall upon him; but the party gave him a release in Court, and that was sufficient. 12 Mod. 345. Mich. 11 W. 3. Anon.

32 ]

# (S) Witnesses. Enabled by Act of the other Party.

1. CRoss examining a witness by one fide in any matter tending to the merits makes him a good witness for the other fide, though otherwise liable to an exception. Vern. 254. pl. 226. Mich. 1684. Corporation of Sutton Coldsield v. Wilson.

### (T) Witness. Disabled by Suspicion of Fraud.

1. A and B. two brothers; the goods of B. in his house were taken in execution, A. supposing them to be his goods brings trover, and B. and his wife were denied to be witnesses to prove them the goods of A. though it were to divest the property out of themselves, because it savoured of fraud. Q. 12 Mod. 346. Mich. 11 W. 3. Anon.

# [ 33 ] (U) Witnesses. Who. One Offender admitted against another.

1. IN a trespass against A. one B. was admitted a witness against him, though, by his own confession, he was a joint trespasser, and by this oath did cast the damages upon his companion, and so in a manner freed himself. Clayt. 115. S. C. pl. 200. August 1647. Anon.

2. A debtor rescued was allowed as a witness, his credit being left with the jury. 6 Mod. 211. Trin. 3 Ann. B. R. Wilson v.

Gary.

3. Son intrusted with his father's cash, and to receive and pay money, gave it away to J. S. The fon may be admitted as a good witness, his testimony being corroborated by other circumstances; per Holt Ch. J. at nisi prius. 1 Salk. 289. pl. 28. Anon.

- 4. It has been long settled, that it is no exception against a witness, that he has confessed himself guilty of the same crime, if he has not been indicted for it; for if no accomplice were to be admitted as witnesses, it would be generally impossible to find evidence to convict the greatest offenders. Also it hath been often ruled, that accomplices that are indicted are good witnesses for the King, until they are convicted. 2 Hawk. Pl. C. 432. cap. 46. sect. 18.
- 5. And it has been adjudged, that such of the defendants in an information against whom no evidence is given, may be a witness for the others. Ibid.
- 6. It hath been also adjudged, that where A. B. and C. are fued in several actions on the statute for a supposed perjury in their evidence

dence concerning the fame thing, they may be good witnesses in fuch actions for one another. Ibid.

7. A. and B. in execution jointly, they both escaped. The King brought action against the warden for the escape of A. and B. was allowed to prove it. Gibb. 80. Trin. 2 & 3 Geo. 2. at the Sittings in Scace. coram Pengelly Ch. B. the King v. Huggins.

### (W) Witnesses. How they may affift themselves. or demean in giving their Evidence.

1. TATHERE a witness swears to a matter, he is not to read a paper for evidence, though he may look upon it to refresh his memory; but if he swears to words, he may read it, if he fwears he prefently committed it to writing, and that thefe are the very words; per Holt Ch. J. Cumb. 445. Trin. 9 W. 3. B. R. Sandwell v. Sandwell.

### (X) Non-Appearance. Appearance of Witnesses [ 34 ] compellible. How, and the Penalty thereof.

1. IF any person upon whom any process out of any Court of record 5 Eiz. 9. shall be served, to testify concerning any matter depending in the In debt upfame Courts, have tendered to him, according to his calling, his rea- on this ftafonable charges, and do not appear according to the tenure of the faid tute, it was process, having no lawful impediment, he shall forfeit 101. and yield moved, after fuch farther recompence to the party grieved, as any judge of the Court, arrest of out of which the faid process shall be awarded, shall think fit, the faid judgment, fums to be recovered by action of debt, &c. By the 21 Jac. 28. this that the destatute is made perpetual.

not fet forth

the writ with defendant; for the statute is, if he be sued with process; and it is not serving of process when the writ is not lest, although it be read unto the party, and a note lest of the cause, place and day, fed non allocatur; for Jones, Berkeley and Croke, held it to be a sufficient serving of the process within the intent of the statute, and according to the usual course and practice; for there may be two, three, or four names of witnesses in one writ (and so there be usually), and he cannot leave the writ with every one of them, and it would be very chargeable unto the subject to have several writs for every witness. 2d exception, Because he shews that he paid unto her 12d. for her pains, and promifed to pay unto her as much more as the would require, when the came to be a witness at Gloucester, which is not sufficient according to the statute; for the statute is, that he shall pay sufficient charges for her travel, according to the dittance of the place, and the quality of the person so to be paid; and the witness is not bound to accept his promise for the residue, sed non allocatur; for when it is alleged, that he paid unto her 12d. and promifed to pay the refidue when the came to Gloucester, and she accepted thereof, she is then bound to come, for she hath accepted of his promife for the refidue, otherwife she might have refused, and told him she would accept of his promife. 3d exception, Because the plaintiff doth not shew that he is damaged by her non-appearance, viz. that the verdict passed against him, or that he was inforced to be non-suited, or any other grievance; for fois the statute, that the party grieved shall have his part of the tol. and his farther damages taxed by the justices, before whom, &c. But Grimston, for the plaintiff, answered, that the action being brought only for the 101, and not for further damages, it is well enough; and the 101, is due for her non-appearance to the King and the party. But all the juffices held, that the declaration was ill, for this cause; for there ought to be a party grieved by the non-appearance, otherwise there is no cause of forfeiture. And so is the express words and scope of the statute; wherefore it was adjudged for the defendant, absente Brampston. Cro. Car. 540. pl. 4. Pasch. 15 Car. B. R.

35 J

Goodwin v. Anne West.—Jo. 430. pl. 3. S. C. adjudged for the desendant.—Mar. 13. pl. 43. S. C. adjudged the plaintiff nil capiat.—A seme covert being served with process ad testissicandum, and charges sufficient tendered to her. On an action brought on this statute, it was held, that though the party is not at all damnissed, yet the penalty is sorfeited; and the seme coverts are within the said statute; and that the tender of the charges ought to be to the wise; and judgment was given for the plaintiss, though he did not set forth how much he was damaged. Le. 122. pl. 166. Trin. 30 Eliz. B. R. Havithlome v. Harvey.—Cro. E. 130. pl. 3. Havithbury v. Harvey, S. C. and judgment accordingly.—There must be a particular damage set forth, though this is contrary to the Case above. And afterwards a writ of error was brought on this judgment, but it was affirmed, 5 Mod. 355. Trin. 9 W. 3. Maddison v. Shore. And in an action brought on this statute the plaintiss shall have costs, because he is partly grieved, and not an informer. I Salk. 206. pl. 4. S. C.—Comb. 449. S. C. accordingly.—

2. All persons accused and indicted for treason shall have the like process of the Court where they are tried, to compel their witnesses to appear, as is issued for witnesses to appear against them.

3. Before the 12 E. 2. cap. 2. the witnesses were summoned in by the same venire that was awarded against the jury. Jenk. 47.

Co. Litt. 6. b. Reg. Jud. 5.

4. In an action (on 5 Eliz. cap. 9. 29 Eliz. cap. 5.) good proof must be made of proving the subpæna, viz. by leaving a true copy in writing with the party himself, and shewing the subpæna to him at the same time, and also by serving him with a summons or more, according to the quality of the person, and distance of the place where the evidence is to be given. Sty. Reg. 35, 36. Lill. Reg. 25, 207.

5. In criminal cases, if the witnesses come not according to the time mentioned in the process with which they were served, an

attachment lies against them. Sty. 579.

6. The delivery of a ticket containing the substance of the writ, is sufficient service within the act. 5 Mod. 355. Trin.

9 W. 3. Maddison v. Shore.

7. Plaintiff brought an action of debt upon the statute 5 Eliz. cap. 9. for 10l. and declared, that he was warned by subpana to appear such a day at one o'clock in the afternoon to be a witness, &c. and upon nil debet pleaded the subpana given in evidence was generally to appear at this day, and not at such an hour; and though a subpacena to appear at such a day be of that effect that the party ought to attend the whole day, and so, as it was objected, includes that he ought to appear at this hour, yet in respect of the variance it cannot be said to be the subpacena on which the plaintist did declare, and therefore he was nonsuited; and in this Case no regard was had to the ticket left with the defendant, which was according to the declaration. Tr. per Pais, 7th edit. cites 24 Car. 1. Radford's Case.

# (Y) Punishment of Witnesses for refusing to be sworn.

Salk. 27°.

1. LORD Preston was committed by the Court of Quarter Sessions, for resusing to be sworn to give evidence to the M. B. R. grand jury, on an indictment of high-treason. He was brought

by habeas corpus into B. R. and Holt Ch. J. faid, it was a great The King contempt, and that had he been there, he would have fined him, and committed him till he had paid the fine, but being otherwise, he was bailed.

### (Y. 2) Demeanor of the Counfel, as to Witnesses.

I. IN examining a witness, counsel cannot question his whole life, as that he is a whore master, &c. but if he has done fuch a notorious fact, which is a just exception against him, they then may except against him. March. 83. pl. 136. Pasch. 17 Car. Anon.

2. One shall not ask a witness a question, the affirmative answer

to which may draw him into a crime. L. P. R. 555.

3. An evidence given to a jury may be answered by the counsel, either by confessing and avoiding it, or else by encountering the evidence given, with giving stronger evidence, and of greater credit on the Mich. 22 Car. B. R. which is upon the matter, a denial of the evidence given on the other fide to be true, by prov-

ing the contrary. L. P. R. 548.

4. The defendant's counsel ought to conclude by way of answer to the evidence that was given to the jury by the plaintiff's counsel. Mich. 24 Car. B. R. for if the plaintiff's counsel doth begin the evidence, it is reason, that the defendant should speak in answer to that evidence, because he is upon the defensive part, and is to give answer to all that is faid against him, in matter of evidence; but the plaintiff's counsel, after this, is to sum up his evidence to the jury, which is no more than to put them in mind how he hath proved his caufe. L. P. R. 551.

5. Upon a trial at the bar, the counsel of that party who doth begin to maintain the iffue that is to be tried, whether it be the counsel of the plaintiff, or the counsel of the defendant, ought to conclude the evidence. Pasch. 1650. 1 Maii. B. S. that is only fum up his evidence given; but if he give new evidence, the other party hath liberty to answer it, or encounter it with another evi-

dence. L. P. R. 551.

6. Holt would not fuffer the plaintiff to discredit a witness of his own calling, he swearing against him. 12 Mod. 375. Pasch, 12 W. 3. Adams v. Arnold.

### (Z) Witnesses. How many are necessary to prove a Thing.

1. WHERE two or three offences of the same species, and against the same parties, are proved by single witness, viz. one witnefs to each offence, here fingularis testis sufficit. King v. Newton, in Canc. Stell. Dy. 99.

2. Of two accusers, if one be of his own knowledge, or hearing,

36 ]

and told it to another, this likewise may be an accuser. The King v. Thomas, for treason, Dy. 99. b. pl. 62. Pasch. I Mar. A Case is cited, where one who was told it at the third hand, was admitted an accuser. And if one witness depose in the point in question, and another in the circumstance, this stall be sufficient ground for the judge to give his sentence. Dy. 53. b. Marg. pl. 1. Mich. 10 Jac. in the Star-Chamber, Adams v. Canon.

3. In the Spiritual Court, one witness is no evidence. 2 Roll. R. pl. 42. Trin. 16 Jac. B. R. in Case of Barnewell v. Tracy.

It is not neceffary in
any case at
common.

Law, that a
proof of
matter of
fact thould

and upon such exidence as is given to the
made by

4. When a trial is by witnesses regularly, the affirmative ought to
be proved by two or three witnesses, as to prove a summons of the
tenant, or the challenge of a juror, or the like. But when the trial
upon witnesses, or other kind of evidences, but upon the verdict,
and upon such evidence as is given to the jury, they give their
tenants of the proved by two or three witnesses, as to prove a summons of the
tenant, or the challenge of a juror, or the like. But when the trial
upon witnesses, or other kind of evidences, but upon the verdict,
and upon such evidence as is given to the jury, they give their

more than one witness, and the authorities cited Inst. 6, b. does not warrant the opinion there sounded upon them; per Holt Chs. J. Carth. 144. Trin. 2 W. & M. in B. R. Shotter v. Friend.—The reason why the civil law requires two witnesses, is because their trial is by witnesses, and not by a jury of twelve; Plo. Com. 12. a. Serjeant Hawkins says, that the generality of authorities, cited by Sr. Edw. Coke to prove that one witness was not sufficient to convict a person of high-treason, (3 Inst. 24, 25, 26), wholly relate either to the proof of an essoin, or of a summons in a real action, or of the default of persons summoned on a jury or other matters, rather less to the point. 2 Hawk. Pl. C. 256. cap. 25. f. 131.

In the Case 5. There being but one witness against the defendant's answer, of the Earlost the plaintiff could have no decree. Vern. 161. pl. 151. Pasch. v. the Farl 1683. per Ld. Keeper. Alam v. Jourdan.

Mich. 1693. 3 Chan. Cases, pag. 123. Ld. Keeper Somers said, he took it that no decree can be made against a man's answer upon the proof of one witness.

6. A fingle witness against the defendant's oath, is not sufficient evidence to decree against the defendant, nor will the Court send it to be tried at law. 2 Vern. 283. Christ's Coll. in Camb. v. Widdington.

[ 37 ] 7. 2 W. 3. eap. 3. fect. 3. No, person shall be indicted, tried, or attainted of high treason, whereby any corruption of blood may happen, or of misprission of such treason, but by the oaths of two lawful witnesses, both of them to the same overtact, or one of them to one, and another of them to another overtact of same treason, unless the prisoner willingly in open Court confess the same, stand mute, or resuse to plead; or in cases of high treason, shall peremptorily challenge above thirty-sive of the jury.

Provided, that if any person indicted, as asoresaid, of any such a treason, or misprission of treason, may be outlawed, and thereby attainted thereof; and in cases of high treason, where by law the party outlawed may come in and be tried, he shall upon such trial have the benefit of this act.

And if two distinct treasons shall be laid in one indictment, one witness to one of the said treasons, and another witness to another of

the said treasons, shall not be deemed two witnesses to the same treason within the meaning of the act.

Provided, that this act shall not extend to impeachments, or other

proceedings in parliament.

Nor to the treasons of counterfeiting the coin, the great feal, privy feal, fign manual, or privy fignet.

# (A. a) Objections to the Credibility of a Witness in that particular Cause.

1. A furor who is challenged for giving his verdict before hand, or for being of counsel of the party or of his robes, cannot give evidence to the jury after. Br. General Issue pl. 65. cites 49. Ass.

2. Contra of him who is challenged for taking of money or such like he shall not give evidence; for this goes in reproof and

dishonesty: Note the diversity. Ibid.

3. A prisoner having escaped may be a witness to prove the escape voluntary, upon traverse of an inquisition for the office of warden of the Fleet against the warden. Objection, that he was returned, and he to save his own bond which he gave to be a true prisoner and would intitle him to an action of false imprisonment and compared it to the case of an usurious bond; sed per Cur. this bond is a collateral matter to the escape, and the consequence of his evidence as to that bond is not material to disable his being a witness, and not like the case of usury, for that renders the bond void, and this is a matter transacted privately between the party and the officer, of which there can be no other evidence. 2 Salk. 690. Mich. 12 W. 3. King v. Ford.

4. The master may well bring the action where the fervant was robbed; and to prove what money the servant had, which was 200l. he was called to prove how much money he had delivered to them, and that he had been formerly trusted by his master, and had well discharged that trust. Clayt. 35. pl. 62.

Aug. 11 Car.

5. A witness having taken money, does not incapacitate him from giving his evidence; but the jury may give less credit to his evidence, otherwise if he take money upon the event of the cause, 11 Mod. 228. pl. 2. Hill. 8 Ann. B. R. Young v. Slaughterford.

# (B. a) Witnesses. What Persons in certain Cases [ 38 ] shall not be compelled to give Evidence.

1. A N issue was joined upon a corrupt agreement, and a witness Skin. 404. was called to prove this agreement; and being sworn and Anon. S. C. asked by the defendant's counsel, what money he knew to be and S. P. paid upon that agreement, he appealed to the Court, and declared,

clared, that he was and had been for many years the plaintiff's attorney, and that he was employed by the plaintiff to draw the agreement between the plaintiff who was high-sheriff of K. and his under-sheriff; and therefore prayed, that he might not be put to discover his client's secrets wherein he was intrusted; whereupon the Court declared, that he ought not to be obliged to answer that question; and thereupon, for want of evidence, the jury found a verdict against the plaintiff. The Court declared, if this should be admitted, it would be a manifest hinderance to all fociety, commerce and conversation. Mich. 5 W. & M. L.P. R. 556.

2. A lawyer who was of counsel may be examined upon oath as a witness to the matter of agreement, not to the validity of an affurance or to the matter of counsel. L. E. 81. pl. 81. March 83.

Oneby's Cafe.

- 3. In a trial at the bar, one Mr. Cony a counsellor at the bar was examined upon his oath to prove the death of Sir Thomas Cony; whereupon Serjeant Maynard urged to have him examined on the other part, as a witness in some matters whereof he had been made privy as of counsel in the cause; but Roll Ch. I. answered, he is not bound to make answer to any thing which may disclose the secrets of his chient's cause, and thereupon he was forborne to be examined. Cites Styl. 449. Pasch. 1655. Waldron v. Ward.
- 4. Mr. Aylott having been counsel for the defendant, defired to be excused to be sworn on the general eath as witness for the plaintiff, to give the whole truth in evidence, which the Court, after fome difpute, granted, and that he should only reveal fuch things as he either knew before he was of counsel, or that came to his knowledge fince by other persons; and the particulars to which he was to he fworn were particularly proposed, viz. what he knew concerning a will in question; whether he knew any thing of his own knowledge. 1. Keb. 505. pl. 68. Pasch. 15 Car. 2. B. R. Spark v. Sir Hugh Middleton.

5. A clerk attending upon a grand jury, shall not be compelled to be a witness to reveal that which was given them in evidence.

T. per Pais, 226.

6. A folicitor or promotor, not to be examined as a witness. Toth. 275. cites Wilson v. Grove. Trin. 6 Car. li. B. fo. 626.

7. A man that conveys lands may be a witness to prove he had no title, because that is swearing against himself, but he is not compellable to give fuch evidence. 2 Ld. Raym. Rep. 1008. Hill. 2. Ann. Title v. Grovett.

8. A folicitor was produced as a witness concerning a razure of a elause in a will supposed to be done by his client; but it appearing that this difcovery of which he was now about to give evidence, had in Case of been made before the retainer of him as solicitor, the Court were of opinion that he might be fwore; otherwife if he had been retained his folicitor before; the same law of an attorney or counfel. Vent. 197. Pasch. 24 Car. 2. B. R. Cuts v. Pickering.

S. P. admitted by Hale Ch. J. Vent. 197 Jones v. tels of Manchefter.

o. A. makes several mortgages to B. C. and D. and in the last mortgage B. is a party, and agrees that after he is paid he will fland a truftee for D. It was decreed that C. shall be paid before D. for [ all the securities being transacted by the same scrivenor, notice to him was notice to D. 2 Vern. 574. pl. 519. Hill. 1706. Brotherton v. Hatt and

39 ]

10. In a trial at nisi prius at Westminster, one Saunder who had drawn an indenture of agreement between a sheriff and his under sheriff, being produced to prove a corrupt agreement between them, he was not compelled to discover the matter of it though he was not a counsellor; and per Holt Ch. J. it seems to be the same law of a scrivener, Skin. 404. pl. 40. Mich. 5 W. and M. B. R. Anon.

### (C. a) Witnesses. What Persons shall not be Witnesses unless sworn. In what Cases, and how.

I. THE Lord Mohun put the Court to declare, that a peer 2 Mod. 99. produced as a witness ought to be sworn, because he S. C. and S. P. the faid the House of Lords had made an order contra. 3 Keb. 631. Court were pl. 26. Pasch. 28 Car. 2. B. R. Earl of Shaftsbury v. Lord all of opi-Digby.

ought to be

fworn, and so he was, but with a falvo jure .- Freem. Rep. 422. pl. 566. S. C. held accordingly. And per totam Curiam, though a peer cannot be compelled to be fworn, yet if he be not fworn, whatsoever he speaks is no evidence, and so he was sworn.

2. Quakers are not fworn when they give evidence, but only take a folemn affirmation, and this is by an act of parliament made 1 Geo. L. E. 17. pl. 8.

# (D. a) Demeanor of and to Witnesses in general.

#### How it must be, or may be.

I. IX/ITNESSES are fworn to tell the truth of what they See tit. know, not what they believe, for they are to fwear nothing Apportionment, p. 8. but what they have heard or feen. L. E. 16. pl. 4. cites Lib. Affiz. the matter An. 23. Placit. 11. Vaugh. 142. Bushell's Cafe.

Worth v.

Viner, as proposed by the plaintiff's counsel.

2. To make mention of matters against a witness which is not to 2 Keb. 545the present purpose, but improper and defamatory, will give a good Mich. 21 action upon the case. Resolved on evidence upon a trial at bar. Car. 2. S. MSS. Rep. Mich. 19 Car. 2. in the Case of Sir John Turber- C. but this ville v. Savage.

point does not appear.

Mod. 3. pl. 13. Anon. S. C. but S. P. does not appear.

# (E. a) Witnesses. Persons injured.

the cheat was in exchanging ed wine for hatsof 1181. the indictment was quashed for its being called Vi-

S. C. and I. INdictment for a cheat done to J. S. by imposing upon him a quantity of beer mixed with vinegar and grounds of coffee for Port wine; one of the defendants pretended to be a broker, and this pretend- the other a Portugueze merchant, for the better carrying on of the cheat; and per Holt Ch. J. J. S. was allowed to be a witness to value. But prove the fact upon the trial, for in fuch private transactions nobody else can be a witness of the circumstances of the fact, but he that fuffers. 1 Salk. 286. Mich. 2 Ann. B. R. the Queen v. Mackartney & al.

mum prætenfum. 6 Med. 301, 302. Mich. 3 Ann. - 7 Med. 119.

### (F. a) Witnesses. Who. Particeps Criminis.

1. IF there be diverse defendants, and one of them does not accuse himself, but accuses his companion, another defendant, he shall not be received as a competent testimony to condemn his companion; but if he had accused himself, then he should have been received as a competent testimony to condemn his companion. Noy. 154. Anon.

2. A man attainted of piracy is not a good witness to prove another guilty or not guilty of piracy. P. 15 Ja. B. R. per Cur. in one Woodford's Case, upon evidence at bar, Trial. (H. f.)

3. If a man upon examination accuses another of piracy, and after he himself is attainted of piracy, and after being pricked in his conscience sends for the party accused, and acknowledges before witnesses that he accused him before fallely, and by procurement of a firanger, yet this confession shall not be taken to enseeble his testimony made before his attainder, because it is made by a man attainted. P. 15 Ja. B. R. Woodford's Case, per Cur. præter Dodderidge, who seemed to incline e contra. 2 Roll. Trial (H. s.)

So particeps criminis is a good witness nal ftatute. 2 ]0. 155.

Yet Stv.

401. Hill.

it is faid

they may,

unless mat-

4. In trespass it appeared by the witness's own evidence that he himself was one of the persons guilty of the trespass, but was left upon a pe. out of the declaration; per Hale, he is a legal witness, although his credit was lessened by it, because he swears matter to his own discharge; for if judgment pass against the defendants, and they have fatisfied the condemnation, he may plead the same in bar of any action brought against himself. Mod. 283. Trin. 29 Car. 2. B. R. Lutterell v. Reynell.

5. And this testimony may be supported by collateral decla-16:4. B. R. rations of his to the fame purpose, thereby to prove that he was confiltent with himself, whereby his testimony was corroborated. But those in the simul cum are no witnesses. Ibid.

ter is proved against them- As where they are put in by covin to take away their testimony.

There the justices may and ought to receive their testimony; and so it was done in the Case of Dymoke & al .- So if the plaintiff furceafes his fuit against any defendant at the affizes. Godb. 326. pl. 418. Pafch. 21 Jac. B. K. Anon.

5. Witneffes which were defendants, and which are suppressed by order of the Court, although that afterwards there are no proceedings against them, yet they shall not be allowed of at the hearing of the cause; agreed per tot. Cur. Godb. 439. pl. 504. Mich. 4 Car. in the Star-Chamber. Huet v. Overy. And this was declared to be the constant rule of that Court.

6. An information was against A. for seducing and debauching a young lady, M. was admitted an evidence, and fworn in behalf of A. Skin. 81. pl. 23. Mich. 34 Car. 2. B. R. Lord Grey's Cafe.

7. The defendant was convicted upon the statute of 13 Car. 2. against killing deer, upon oath of the informer, who is to have a moiety of the penalty of 201. It was objected, that the informer ought not to be a witness, because he is to have a moiety of the forfeiture; sed per Curiam he is a good witness. 3 Mod. 114. Trin. 2 Jac. 2. B. R. Jennings v. Hankys.

8. B. was indicted for striking H. in Westminster-Hall sitting the Court, and H. was the evidence allowed, although B. proved that H. offered B. to compound the profecution, for fuch act shall not invalidate his testimony, because it shall be intended that such composition was for the battery, and not for the contempt done to the Court. Sid. 211. pl. 8. Trin. 16 Car. 2. B. R. the King v. Bockman.

9. C. was indicted for a misdemeanor in receiving stolen goods, Comb. 289. knowing them to be stolen; and the very thief was produced as an the King evidence, who confessed the fact, he being brought up by habeas against Cross corpus ad testificandum from the Compter; per Holt Ch. J. fame Case. these indictments were never thought good by me before I came upon the bench, though I have been over-ruled in it once; but let us try the fact first, and it shall be considered after whether the indictment be maintainable. And he faid, fome judges would try a trover for goods before an indictment for the taking; but he never would do it, but rather get a juror withdrawn, if the matter had proceeded fo far, that the plaintiff might not be nonfuited; and the plaintiff in this action was bound in a recognizance to profecute the principal felon in 40l. in Court. 12 Mod. 520. Pasch. 13 W. 3. the King v. Cross.

# (G. a) Witnesses disabled by Crime.

### Enabled by Pardon, or fome After-Act.

I. IN the Star-chamber, exception was taken to one of the witnesses, viz. Dr. Spicer, because he had stolen plate, and had been pardoned for it. But notwithstanding the exception, the Court did allow of the testimony of the said Dr. Spicer. Note, It did not appear in the Case of Fines, the principal case. whether the pardon by which Dr. Spicer was pardoned were a... general pardon, or whether it were a particular and special pardon. L. E. 38. pl. 10. cites Godb. 288. Pasch. 21 Jac. B. R. Sr. Henry Fines Cafe.

• S. P. Skin. 578. Crofby's Cafe.

2. Note, In the Case of the King v. Ford, 2 Salk. 690. it was argued, that a bare conviction of perjury, would take away one's evidence; because it is an infamous crime, not so of barratry, which was not of an infamous nature, without an infamous punishment inflicted, as the pillory, &c. but the Court held contra, and that it was not the nature of the punishment, but the \* nature of the crime, and the conviction thereof, that created the in-[ 42 ] famy; and per Holt Ch. J. if one be convicted of perjury on the flatute, he cannot be restored to his credit by the King's pardon, for by the statute, it is part of the judgment, that he be infamous and lose his credit; but he may be restored to his credit by a statute pardon; but in indictments of perjury at common law, the infamy is only the consequence of the judgment, and therefore the King's pardon in fuch cases, restores the party to his credit.

L. E. 37. pl. 7.—cites 2 Salk. 514.

3. It was refolved by all the judges, that those prisoners who were equally culpable with the rest, may be made use of as witnesses against their fellows, and they are lawful accusers, or lawful witnesses, within the statute. 1 Ed. 6. 12. 5 & 6 Ed. 6. c. 11. & 1 Mar. 1. And accordingly at the trial of those men, some of their partners in the treason, were made use of against the rest; for lawful witnesses within those statutes, are such as the law alloweth; and the law alloweth every one to be witnesses, who is not convicted, or made infamous for some crime; and if it were not fo, all treasons would be fase, and it would be impossible for one who conspires with never so many others to make a discovery to any purpose. But the Ld. Ch. B. Hale said, that if one of these culpable persons be promised his pardon on condition to give evidence against the rest, then that disables him to be a witness against others, because he is bribed by faving his life to be a witness, so that he takes a difference where the promise of pardon is to him for disclosing the treason, and where it is for giving evidence. But some of the other judges did not think the promise of pardon, if he gave evidence, did difable him; but they all advised, that no fuch promise should be made, or any threatenings used to them, in case they did not give full evidence. L. E. 48. pl. 24. cites Kelynge 18.

4. In evidence on a trial at bar, it appeared, that one Alcott, one of the witnesses for the defendant, was indicted of perjury, in the time of Cromwel, and verdict given against him; but by the death S. C. held of Cromwel, judgment was not entered, but all proceedings vacated. The plaintiff's counsel offered this verdict in evidence to weaken the credit of the witness, but the Court resolved, that the faid verdict is now totally destroyed, and cannot be given

Keb. 134. pl. 60. Gary v. Smallbrook. accordingly. The Court would not admit the

in evidence. Raym. 32. Mich. 13 Car. 2. B. R. Finch v. evidence, be-Smalbrook.

discontinued by alteration

of government; but it was agreed, that evidence might be given viva voce, to prove him perjured; the other fide, to establish the witnesses credit, produced a pardon of the perjury; but per Cur. that will not do, for it cannot restore him to his credit. Sid. 51. pl. 16. Wicks v. Smalbroke. S. C .-

5. If one be convicted of perjury, upon the statute, he cannot be At common restored to his credit by the King's pardon; for by the statute, it law, it is only a conis part of the judgment, that he be infamous and lofe the credit fequential of testimony; but he may by a statute pardon. But in other cases, disability; where the infamy is only the consequence of the judgment, the therefore in this case, King's pardon may restore the party to his testimony. 2 Salk. the King 691. in pl. 3. Mich. 12 W. 3. B. R. cited by Holt Ch. J. as held may pardon, upon a trial at bar.

and that restores him to his telti-

mony; but otherwise, where it is upon the statute; for in that case, he must reverse the judgment, or he cannot be restored. 2 Salk. 514. Mich. 9 W. 3. B. R. The King v. Grepe.

### (H. a) Process against Witnesses. And Punishment [ 43 ] of not appearing.

flat. 1. cap. 2. ENACTS, that when a deed is denied in the King's flat. 1. cap. 2. Court, wherein witneffes be named, process shall be awarded to cause such witnesses to appear as has been used, so that if none of them came in at the great diffress returned, or if it be returned, that they have nothing, or that they cannot be found, yet the taking of the inquest shall not be deferred; and if the witnesses come in at the great distress, and the inquest for some cause remains untaken, the witnesses Thall have the like day given them, as is affigued for the taking of the inquest; at which day, if the witnesses do not appear, the issues that were first returned upon them, shall be forfeit; and the taking of the inquest shall not be deferred, because of their absence. And for absence of witnesses, dwelling within franchises, where the King's writ original does not run, the taking of an inquest shall not be deferred.

2. In quare impedit, it was faid per Belk, that at the last affife in Effex, before Ludlow in affife of rent; the iffue was, that ne chargera pas by the deed, and process was made against the witnesses, because witnesses were in the deed. Finch. faid, certainly it was against the law, for the deed is not denied, but Kirton contra; for a stranger to the deed cannot have other nature of anfwer; for he cannot deny the deed; therefore the deed is fo far denied, that a stranger may deny it, therefore quære. Br. Test-

moignes, pl. 1. cites 43 E. 3. 2.

3. In affife, the tenant pleaded bar by one who had nothing but estate for life, the remainder to one J. que estate the tenant has, and that the tenant for life aliened to the plaintiff and died, and J. entered que estate the tenant has, and gave colour to the plaintiff; and the plaintiff faid, that where he faid, that the first tenant had only Vol. XII. estate

estate for life by lease of W. N. the remainder to J. he had estate tail by the deed of W. which he had shewed; and the tenant faid, that nient le fait & non allocatur, for a stranger, &c. and therefore he faid, that ne dona pas by the deed, and the others contra; and process was against the witnesses, as well as if he had had issue upon non est factum, contra it was faid therefore the next term. Br. Testmoignes, pl. 3. cites 2 H. 4. 21.

4. In affife by an infant, deed of the grandfather, with warranty was pleaded in bar, in which witnesses were named, and the affise was charged upon the circumstances of the deed, without making process against the witnesses. Br. Testmoignes, pl. 10.

cites 18 Aff. 11.

5. Where the iffue was that ne releasa pas by the deed before the note levied, which iffue was taken by a stranger to the deed, process was made against the witnesses as it was faid; for though the deed is not expressly denied, it is denied in as much as a stranger may deny it. Br. Testmoignes, pl. 2. cites 44 E. 3.

6. Where witnesses make default at the grand distress no further process shall be made against them, but only against the inquest; for the Statute of York is, that by default of the witnesses at the grand diffress, the inquest shall not be denied by the absence of the witnesses. Br. Testmoignes, pl. 5. cites 8 Aff. 15.

7. Affife against an infant who pleaded release of the plaintiff bearing date at E. which was denied, and witnesses were named in the deed, by which process issued to sheriff to cause the witnesses to come, and the inquest was of the same visne, where the inquest were named, and after it was faid that they cannot take inquest of the foreigners upon deed bearing date at E. and after this pannel was ousted, and process continued against the witnesses, [ 44 ] and process to cause a jury to come from the city of E. notwithstanding that the tenant be within age, and cannot be attainted of the diffeisin by the trial of the deed. Br. Testmoignes, pl. 6. cites 20 Aff. 13.

8. In affife by an infant, deed of his father with warranty was pleaded, and inquest was of the circumstances, and process was made against the witnesses also as well as if he had been of full age and had denied the deed quod nota, and at the grand distress they did not come by which the affife was taken as the statute wills, without having regard to their not coming, to which it was faid that the statute does not give it, but where the deed is denied at the mifne of the parties, so in this case; and if the Court will enquire of office, as above, the process remains at common law, and thereupon they were adjourned into Bank, therefore quære. Br. Testmoignes,

pl. 7. cites 11 Aff. 19. 9. In affife by an infant, the tenant pleaded deed of the anceltor with warranty, and the plaintiff faid that riens paffa by the deed, and the affife was awarded without making process against the witnesses, because the deed bore date in the vill where the land in

the plaint lay; for by some if it had bore date in another county, then

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process shall be made against the witnesses, quære inde. Br.

Testmoignes, pl. 11. cites 22 Aff. 11.

10. In affife deed is pleaded at iffue in which are witnesses, and the plaintiff averred all to be dead, et non allocatur, but process made upon the statute; for this comes in by return of the sheriff. Br. Testmoignes, pl. 13. cites 25 Ass. 14. and 26 Ass. 8. accordingly.

II. In assise a man made feoffment without deed and delivered feisin upon condition contained in certain indentures, and witnesses were in the indentures; the feoffor entered for condition broken, the other brought affize; the tenant pleaded this matter, he shall not have process against the witnesses, contra if the feoffment had been by deed, and witnesses had been in the deed of feoffment, for the feoffment upon condition is the force of the bar and not the indentures. Br. Testmoignes, pl. 14. cites 28 Aff. 1.

12. In affife by an infant, deed of the ancestor was pleaded, and witnesses named, and the assise was awarded without making procels against the witnesses, and good per justiciarios; for process shall not be made against the witnesses but where the deed is denied, and infant in affife fivall not be fuffered to deny the deed; for there the allife shall inquire of all the circumstances. Br. Testmoignes,

pl. 15. cites 29 Ail. 57.

13. In affife, the tenant pleaded release of the plaintiff, to which the plaintiff said, that after this the tenant leased to him for years, and after by his deed, &c. released to him in fee. Lud. faid, he did not release by the deed prift, and the others e contra, and process was made against the witnesses; for the deed is in a manner denied quod nota. Br. Testmoignes, pl. 16. cites 31 Ass. 25.

14. Deed was pleaded in bar, and the plaintiff faid, that nothing paffed by the deed. And per Townsend, process shall not be made against the witnesses, but Brian and Vavisor contra. Br.

Testmoignes, pl. 21. cites 5 H. 7. 8.

15. In affife by an infant, deed of the ancestor with warranty was pleaded in which were witnesses, and process was made against the witnesses upon the circumstances without denying the deed, quod nota. Br. Testmoignes, pl. 17. cites 35 Aff. 9.

16. In affife of rent the defendant pleaded release of all the right of the father of the plaintiff, in which were witnesses, and the plaintiff said, that non est factum, and the defendant would have confessed the witnesses dead if the plaintiff would have affented to have maintained the affife; and the plaintiff would not affent but prayed process against the witnesses. Br. Testmoignes, pl. 18. cites 41 Aff. 6.

17. In affise of rent the tenant pleaded hors de son fee, the other [ 45 ] shewed deed of rent-charge made by W. N. Knight, he ne charga pas by the deed, and per Cur. process was made against the witnesses, though the deed was not denied. Br. Testmoignes, pl. 19. cites 41 Aff. 23. But Thorpe and Finch. were of a contrary opinion, H. 42 E. 3. in a quare impedit.

18. Affife baron and feme, who pleaded release, which was denied, and in which were witnesses, and process was made against them,

the sheriff returned that they were dead, and after the seme was received in default of the baron and pleaded the same deed again, and prayed process against the witnesses, and could not have it because the sheriff had returned them dead before, by which the aisse was awarded quod nota. Br. Testmoignes, pl. 20. cites 43 Asi. 16.

19. In trespass per Martin and Rolf, if a deed in which are witnesses be pleaded in trespass, and is denied, process shall issue against the witnesses, and yet it is action personal. Br. Testmoignes,

pl. 23. cites 1 H. 6. 5. at the end.

20. In affife, if deed pleaded is confessed and avoided, it is said that process shall not issue against the witnesses. Contra, where the deed is denied; for in assis, if the tenant pleads jointenancy by deed, and the plaintist shews that the jointenancy was conveyed pending the writ, process shall not issue against the wit-

nesses. Br. Testmoignes, pl. 25. cites 7 Ass. 10.

21. In affife by two the one an infant, and the other not, and deed of their ancestor was pleaded, by which the assist was awarded at large of the circumstances against him who was within age, and he of full age was compelled to answer, who said, that nothing passed by the deed, and witnesses were in the deed, and therefore process was awarded against the witnesses. Br. Testamoignes, pl. 26. cites 26 Ass. 65.

22. Process shall not be against the witnesses unless the party prays it, quod nota. Br. Testmoignes, pl. 27. cites 12 E. 4. 4.

23. In ward the defendant pleaded feoffment of the ancestor of the infant, the plaintiff said that it was upon condition to infeoff the heir at his full age by collusion, to out him of the ward, &c. The defendant said that it was simple and without condition, or collusion; Prist and the others e contra, and the defendant prayed process against the witnesses, and had it. Br. Testmoignes, pl. 28. cites 45 E. 3. 22.

A feme covert was ferved with grovert was ferved with of a Court of record to testify as a witness (being tendered process as convenient charges, and having no reasonable lett) shall therein make a witness, default, on pain to forfeit to the party grieved 101. and besides to yield and tenderbim such farther recompence as the judge of the same Court shall think charges, but sit; according to the damage sustained, which said sums shall be by him she did not recovered in any Court of record by action of debt, in which no wager, debtbrought essentially.

on this ita-

tuse for the tol. for her not appearing, it was held that she was within the statute, and that the tender of the charges was to be to her, and not to her husband; and judgment for the plaintiff, though it was moved in arrest of judgment, that the plaintiff did declare that the not-appearance was to his damages, but did not shew what damages. Cro. E. 130. pl. 3. Paschr. 3. Eliz. B. R. Havithbury v. Harvy, & ux.—Le. 122. pl. 166. Havithlome v. Harvey, S. C. adjudged for the plaintiff. A note of process was left at the defendant's (the witness's) house, being 40 miles from London, and 12d. to bear his charges which the party did accept; and the party who served the process promised the desendant sufficient costs. Exception was taken, 1st, Because the process was not served upon the desendant as the statute requires, but a note only thereof, and it being a penal statute, ought to be taken strictly. 2dly, That 12 d. only was delivered, which was no reasonable sum for costs and charges according to the distance of the place, as the statute speaks; and therefore the promise that he would give him sufficient for his costs afterwards

is not good. 3dly, The party who recovers by force of this statute, ought to be a party grieved and samnified, as the statute speaks, by the not-appearance of the witness; and because the plaintiff had not averred that he had loss thereby, and therefore conceived the action not maintainable. But for the first the Court was clearly against him, because it is the common course to put divers in one process, and to serve tickets, or give notice to the first persons who are summoned, and to leave the process itself with the last only, and that is the usual course in Chancery; but if there is only one in the process, then the process itself ought to be left with the party. As to the 2d the Court did conceive that the acceptance should bind the defendant, but if he had refused it, there he had not incurred the penalty of the statute; for he ought to have tendered sufficient costs according to the distance of the place, which 12 d. was not, it being 60 miles distant. But as to the 3d exception, the Court was clear of opinion, that action would not lie for want of averment that the plaintiff was damnified for the not-appearance of the defendant; and fo it was adjudged that the plaintiff nil capiat, per billam, Mar. 18. pl. 43. Pasch. 15 Car. Goodman v. West. — Jo. 430. pl. 3. Goodwin v. West. S. C. held accordingly. — Cro. C. 540. pl. 4. S. C. adjudged for the defendant. — 5 Mod. 355. Trin. 9 W. 3. Maddison v. Show. S. P. the Court of C. B. held the declavation ill, because the plaintiff had not set forth any special damage sustained by him by defendant's not appearing to give evidence, as that he was nonfuited or could not proceed to trial for want of the defendant's evidence, and a particular damage must be set forth; and afterward a writ of error was brought on this judgment, but it was affirmed, though contrary to the Cafe of Cro. E. 120. & I.e. -In such case plaintiff shall have his costs too. Comb. 449. S. C .pl. 4. Shore v. Maddiston. S. C. accordingly.

25. One was subposenaed ad testificandum, and prayed a priviledge from being arrested, which was granted; and per Cur. it will supersede an arrest upon mean process, but not upon an execution; yet the sheriff in that case may be committed for the contempt. Triper Pais, 7th edition, 330. sect. 1. cites Mich. 15 Car. 2. B. R.

# (I. a) Witnesses joined to the Inquest. In what Cases.

1. A Witness who was outlawed, was fworn with the inquest. Br. Testmoignes, pl. 29. cites 34 E. 1. & Fitzh. Process, 208.

2. Affife was brought by an infant, and deed of his ancestor was pleaded in bar; and per Thirn. Hank. and Norton, the circumstances shall be enquired, and the witnesses joined to the inquest,

quod nota. Br. Testmoignes, pl. 4. cites 12 H. 4. 9.

3. When process used to be made out against the witnesses in carta nominata to join with the jury in trial of the deed, as was used before the statute of 12 E. 3. c. 2. (his testibus) being then part of the deed, then the number was uncertain, according as the number of witnesses were in the deed; wherefore no attaint lay, if the deed were affirmed, because more than twelve joined in the verdict. But otherwise, if the deed was not found, because witnesses cannot prove a negative. T. per P. 72. cites F. N. B. 106. h. 1 Inst. 6. 2 Inst. 130, &c.

### (K. a) Witnesses. Privileged from Arrests.

1. THE Court was moved to discharge one Cullins, that was arrested as he was attending the Court, to give testimony

as a witness in a cause, and for an attachment against the parties that did arrest him. Germain Justice, absente Roll Ch. J. Take a fupersedeas, and let the parties shew cause why an attachment shall not be granted against them that arrested him.

Sty. 305. Mich. 1653. Anon.

2. If a witness, coming to testify in a cause in Middlesex, and be arrested in London, by one knowing the cause, he hath no remedy, but by a habeas corpus, to examine and deliver him thereby; but if there be any contempt by the officer, &c. an attachment may afterward be awarded against him; for they are as well to have privilege, as the parties. L. E. 29. cites 1 Keb. 220. pl. 28. Hill. 13 Car. 2. B. R. Vandevelde v. Lluellin.

3. He who has a subpæna to give evidence, may have a writ of privilege, to protect him going and coming. L. E. 29. pl. 46.

cites 1 Vent. 11. Hill. 20 & 21 Car. 2. B. R. Anon.

4. The Courts not only protect the parties themselves, but all witnesses are protected eundo & redeundo; for since they are obliged to appear by the process of the Court, they will not suffer any one to be molested, whilst he is paying obedience to their writ. G. Hist. C. B. 168. cap. 17.

### (L. a. 2) Witnesses. Not to be enforced to give Evidence against themselves.

Mo. 9e6.

pl. 1265.
Collier v.

Collier.

S. C. it

was in a cafe of in
Cullier.

Collier.

A Prohibition shall go to Court Christian, if they compel a man to be a witness against himself; for (unless in causes matrimonial, and testamentary) nemo tenetur prodere seipsum.

Cro. E. 201. pl. 28. Mich. 32 & 33 Eliz. B. R. Cullier v.

Cullier.

# (L. a. 3) Evidence by Jurors.

5. P. Tr.

per Pais,

221. For

the Court rors, the Court will examine him openly in court upon his oath, and
and Counfel are to hear
the cought not to be examined privately by his companions; per Curiam,
the evidence Sty. 233. Mich. 1650. B. R. Bennet v. Hartford (Hundred).

#### (M. a) Examination of Witnesses. What they may be examined to, and how.

1. IN some cases, the Courts of common law do judge upon witnesses; but they must ever give their testimony viva voce, as in dower, if the iffue be, whether the husband be alive or not,

&c. 4 Inft. 279.

2. The plaintiff's commissioner would not let a witness de- [ 48 ] clare the whole truth, but held him strictly to the interrogatories, to 4 Stifle the truth. This was held a misdemeanor, and, that commis- \$. P .fioners to examine, ought to be indifferent, and by all means to express the truth, and they are not strictly bound to the end of the interrogatories, but to every thing also which arises necessarily upon it, for manifesting all the truth concerning the matter in question.—And where one of the commissioners went out of the place to the plaintiff into another room during the examination, and had private conference with him, it was held, that a commissioner ought not before publication discover to any of the parties what any witness has deposed, nor to confer with the party after he has begun to examine on the interrogatories, to take new instructions to examine further than he knew before, and if he does, he is punishable by fine and imprisonment. 9 Rep. 70. b. Trin. 9 Jac. in the Star-Chamber. Peacock's Cafe.

3. The defendant's commissioners for examining witnesses, met at the time and place appointed, but refused to join and act in the execution of the commission, and upon assidavit made of this, the Court ordered, that the defendant should name other commissioners, and it was prayed, that the plaintiff might name other commissioners too; because one of his commissioners was not there, so that it seemed to have been a practice; and the Court doubted whether an attachment lay against the defendant's com-missioners or not. Et adjornatur. Hard. 170. pl. 6. Trin.

12 Car. 2. in the Exchequer, with Fortescue & al.

4. Where two witnesses were produced as witnesses, to prove a bond suspected of forgery, the Court upon motion ordered the witneffes to be examined apart, and the one not in the hearing of the other. Sid. 131. pl. 1. Pasch. 15 Car. 2. B. R. Guilliams v. Hulic.

5. A witness swears, but to what he hath seen or heard, generally, or more largely, to what hath fallen under his fenses; but a juryman squears to what he can conclude, and infer from the testimony of such witnesses, by the act and force of his understanding, to be the fact inquired after. Vaugh. 142. Per Vaughan Ch. J. in Bushell's Case.

6. The party who produceth a witness, cannot examine to the difcredit of such witness; per Eyre, Devon. Lent Circuit, 1722. And in criminal cases, where the prisoner calls persons to his re-E 4

putation, this gives an handle to the Crown to give evidence of the prisoner's reputation. Per Page.

### (M. a. 2) Examination on a Voire Dire.

1. UPON a thallenge to a juror, the way is to examine him upon a voire dire, as to the truth of the challenge. Dy. 195.

a. pl. 35. Hill. 3 Eliz.

2. Those that produce an evidence, ought to examine him in chief only; but they against whom he is brought, may examine upon a voire dire, if they please, whether he is concerned in interest.

10 Mod. 151. Pasch. 12 Ann. B. R. Corporation of the Town of Bewdley.

3. When a witness is examined upon a voir dire, and his testimony is admitted, and upon his examination, he appears by his evidence to be interested, no regard is to be had thereto, but the jury are to be directed to lay it aside. But how it is in the course of 'evidence of other witnesses, for before such examination, the other party may prove that he is a party interested, and then his evidence is not to be admitted at all; this was said to have been held by Ch. B. Gilbert in the Exchequer, and he committed a witness who had been examined upon a voir dire, and appeared afterwards upon his examination to be interested; and he said, that the same did hold in equity upon the deposition of such a witness, the Baron sitting; per Lord Chancellor. Pasch. 1743. Moore v. Howell.

4. Of examining a witness upon a voir dire, or as to his character. Vid. Wood's Inst. 1020.

### (M. a. 3) De bene esse.

1. If a witness be examined for the defendant de bene esse to preferve his testimony, and before answer, and upon an order
of Court for his examination made upon hearing of counsel of both
sides, and if after answer the witness die before he is examined again,
the answer coming in on the 28th November, and the witness
dying on December 18th following, and he being sick all the
time, so that he could not go to be examined, the examination of
such witness shall not be read in evidence, because it was taken
before issue joined in the cause, and he might have been examined after, and the defendants did not appear to be in contempt;
per omnes. J. Hard. 315. pl. 6. Mich. 14 Car. 2. in Scacc.
v. Brown.

2. The reason why the Court allows the taking of depositions de bene esse, is either from a contempt in not answering, and thereby preventing the joining of issue, or esse where the party is in danger of losing his witnesses in case of death, by reason of sickness

or age, so that there may be ground to apprehend their not being examined in chief; per Ld. C. Parker. Wms's Rep. 568. Trin.

1719. in the Cafe of Cann v. Cann.

3. Upon a petition for publication of depositions taken de bene esse, after examination in chief of the same witnesses, in order to compare the faid feveral depositions so taken in the same cause, the fame was denied by Lord Ch. Parker, and dismissed the petition, it being admitted on both fides to be without precedent; and faid, that if the witnesses examined de bene esse live to be examined in chief, the depositions de bene esse shall fall to the ground, and are as it were buried, having answered the whole purpose for which they were taken. Wms's Rep. 567. Trin. 1719. Cann v. Cann.

4. It was admitted, that where the delay is made by a defendant, fo that a witness cannot be examined in chief, he either losing his memory, or dying before he can be examined in chief, his depositions taken de bene esse may be read; but it was argued, that if the delay is on both sides, that they shall never be read against the defendant, because he loses the benefit of cross examining the Arg. Mod. 133. Hill. 11 Geo. in Cafe of Southwell v. Ld. Limerick.—On the first point the depositions were allowed to be read. 9 Mod. 210. S. C.

5. A witness ordered to be examined de bene esse, where the thing examined into lay only in the knowledge of the witness, and was a matter of great importance, though the witness was not proved to be old or infirm. 3 Wms's Rep. 77. Mich. 1730. Shirley & al. v.

Ferrers.

6. Motion to examine a witness de bene esse, upon defen-

dant's praying a month's time to answer upon this case.

Upon hearing of this cause, a deed of the family settlement [ 50 ] of lands of 3000/. per annum in Ireland was produced and read, but there being fome fuspicious circumstances attending the faid deed, an iffue at law was directed to try the validity of the faid deed, and if the same was a real or forged deed, but before the issue was tried, a person upon inspecting the said deed, which by order was left in the hands of the Master for all parties to inspect and examine, declared, that he wrote that deed with his own hand in the year 1708, at the request of the late Earl Ferrars, as a copy of a copy of a deed bearing date 1682. So that this writing could not poffibly be a true deed in 1682, which was not wrote till feveral years after the date, and after the death of feveral parties to the deed, and the witness made an affidavit to this effect, whereupon the plaintiffs brought a supplemental bill upon this new discovery after the hearing, and defendants prayed a month's time to anfwer; and now the question was, if this witness shall be examined de bene esse before the answers came in, without the usual affidavit that the witness is old and infirm, or otherwise in danger of dying

Per King C. It is discretionary in the Court to grant, or not to grant liberty to examine a witness de bene esse before issue joined, and though these motions are usually granted upon an affidavit of sickness

or infirmity of the witness, which is not the present case, the witness being of a middle age, and in health, yet he being the single witness, and alone privy to the fact, which cannot be proved without him, and all life being uncertain, I think it reasonable, in the present case, to let him be examined de bene esse : if he should happen to die before issue joined the loss of his evidence would be irreparable; on the other hand there can be no great inconvenience, the other fide being at liberty to cross-examine him, and if be lives till the trial at law this examination will go for nothing, and be must be examined viva voce at the trial. Motion granted. MSS. post Trin. 4 Geo. 2. in Canc. Countess of Ferrars v. Earl of Ferrars & al.

# (M. a. 4) Of whom it may be.

#### Of Plaintiffs or Defendants.

1. THE plaintiff is to be examined upon interrogatories, Toth. 211. cites 12 and 13 Eliz. fol. 380. Lambert v. Lam-

2. A defendant, not being a principal defendant, might be read as a witness, if he were examined on the plainant's party in another suit between other persons. Carey's Rep. 29. cites 10th June 1602. 44 Eliz. in the Cafe of Kingston upon Thames.

3. The plaintiff was examined at the hearing of the cause; Toth.

211. cites Pasch. 6 Car. Kent v. Benham.

4. Note. If a man be named defendant, who is proper to be a witness in the cause, the plaintiff must by order strike out his name before answer; but after answer he may by order examine him as a witness, though his name be not struck out of the bill, if he be otherwise competent, as if he disclaims, or have no interest, or is only a truftee. 2 Ch. Cases, 214. Hill. 27 & 28 Car. 2.

5. After a cause had been heard, and referred to an account, the plaintiff moved to examine two of the defendants de bene effe, which was ordered unless cause; upon which the defendant's 51 ] counsel took this difference, that though it was an order of course to examine a defendant de bene esse, saving just exceptions, yet when the cause is open, and it appears that defendants are parties interested, it is proper to shew cause against such an order before the witnesses are examined; and this difference was allowed to be well taken. Vern. 452. pl. 423. Pasch. 1687. Glover v. Faulkner.

6. But it appearing that releases were given to the defendants, and the matter to be examined to being only matter of account, the cause was disallowed. Pasch. 1687. Vern. 452. Glover v. Faulkner.

7. Plaintiffs cannot be examined as witnesses, because, as Mr. Vernon faid, if the cause miscarries, the plaintiffs will be liable to costs; and therefore their swearing is to exempt themselves, and

Abr. Equ. a totidem

it is their own choice that they are made plaintiffs, for without verbis; and their consent they could not have been made so; but the defen- fays, it was dants are forced into the cause, and if their being made parties Curiam. should absolutely invalidate their testimony, it would be in the power of any one, who had a mind to oppress another, and deprive him of his defence, to make the most material witnesses defendants in the cause, and therefore any of the defendants to a suit may be examined as witnesses, saving just exceptions to their credit, capacity, &c. Gilb. Equ. Rep. 98. Trin. 1 Geo. 1. in Canc. Casey

v. Beachfield. 8. Obiter. If a man unnecessarily makes any one a defendant, he thereby cuts himself off from the benefit of his evidence, for it is his own fault; but where feveral are made defendants, it will not hinder any one of the defendants from the benefit of the evidence of any others that are made so; indeed, in case of trustees, it is necessary that they be made defendants, and therefore there the plaintiff may have the benefit of the evidence. 10 Mod. 19. Pasch.

10 Geo. in Canc. Gibson v. Albert.

9. It was held by Macclesfield C. that a co-plaintiff may be examin'd as a witness, where the substance of the bill was admitted by the defendant's answer; for the reason why a co-plaintiff should not be examined as a witness is, because if the bill is dismissed he is liable to pay costs; but where sufficient is admitted by defendant's answer to found a decree upon, there the reason fails, and there remains no influence upon the plaintiff, if he be not concerned in interest in the cause. A deposition of co-plaintiff allowed to be read. MSS. Rep. Hill. 10 Geo. in Canc. Freeman v. Bridges.

10. One defendant cannot move to strike another out of the bill, who has never been ferved with process in order to make him a witness; but the plaintiff may, and a defendant may have an order to examine fuch defendant, faving just exceptions. G. Equ. R.

Hill. 183. 12 Geo. 1. in Canc.

11. It is a rule, that no co-plaintiff ought to be examined as a witness on behalf of the plaintiff, there being apparent exception against him, viz. his being liable to answer costs, if the cause go against him; Ld. Ch. Parker faid, there is more reason that the defendant should be at liberty to examine one of the plaintiffs, (they being a corporation) 1st. Because the defendant cannot disfranchife any of the corporation as the plaintiffs may (by which they may be made good witnesses for themselves, and without which, they cannot be made fo). And 2dly. If the plaintiff swears any thing against himself, it is good evidence against him, though nothing that he swears can be evidence for him. Nevertheless, the practice is otherwise, and this seems to be in imitation of the common law, where the defendant \* cannot examine the \* vid. plaintiff, and though equity goes so far, as to give either fide tamen leave to examine a defendant de bene effe, yet this rule has not been extended to a plaintiff, who if he be an immaterial plaintiff, the defendant

Palm. 149. Mich. 18

Jac. S. C. but S. P.

pear.

defendant may demur. Wms's Rep. 595. Mich. 119. Mayor and Aldermen of Colchester v. -

12. A party ought not to be examined, though by confent, unless the whole matter be referred to his oath. MSS. Tab. March 23d,

1723. Charters v. Earl of Hyndford.

13. The defendant being a weak man, and to be examined on interrogatories; the Master was ordered to take such defendant's examination, left he should unwarily admit something against himself that was not true. 3 Wms's Rep. 289. Trin. 1734. Piddock v. Brown.

### (N. a) Of Evidence in General.

1. EVIDENCE is any thing offered to a jury, containing in itself un femblance de verity. 2 Sid. 145. per Witherington C. B. Hill. in Cafe of Olive v. Gwin cites Plow. Com. 403. Scholastica's Cafe.

2. The teltimony of witnesses viva voce, is more effectual to discover the truth, than their deposition in paper by confronting them one with another, and fo fift them; as also, by applying certain questions for which they cannot be prepared. Hob. 325. pl. 393. does not ap-

about 17 Jac. in Case of Darcy v. Leigh.

3. Evidentia in legal understanding doth not only contain matter of record, as letters-patents, fines, recoveries, inrollments, &c. writing under feal as court-rolls, accounts, &c. (which are called instrumenta) but in a large sense it also containeth the testimony of witnesses, and other proofs to be produced and given to a jury, for the finding any issue joined between the parties and it is called evidence, because the point in iffue is thereby to be made evident to the jury. Probationes debent esse evidentes (i. e.) perspicuæ et faciles intelligi. Co. Litt. 283. a.

4. Evidence to a jury, is that which may be given in evidence, as by parol, ore tenus, (or) by writing, as any paper unfealed, or under feal; but nothing can be delivered in evidence to a jury, but that which is of record, or under feal, unless by consent; per Witherington Ch. B. in delivering the opinion of the Court. 2 Sid. 145.

Hill. 1658. Olive v. Gwin.

5. Upon motion a rule was made by confent that a deed should be allowed in evidence at the affifes without proving of it. 1 Sid. 269.

pl. 23. Trin. 17 Car. 2. Anon.

6. Evidence is only given for information of the consciences, and therefore if no evidence is given on either part, yet may the jury find the verdict either for the plaintiff or defendant, cites 3 H. 7. 11. a. Frowicke, though the evidence given be exclusive, yet the jury may find against it, and hazard an attaint if they please. Raym. 405. Mich. 32 Car. 2. B. R. Chichester v. Phillips.

7. Evidence viva voce is always best; and though the law requires the best proof that can be had, yet when better cannot be had, it is fatisfied with that which can be had. Re-

2 10. 146. S. C. but S. P. does not appear.

folved. G. Equ. R. 18. Pafch. 8 Ann. in Cafe of Ld. Anglesey v. Ld. Altham.

8. Evidence which is contrary to the matter in iffue, or which is not agreeable to it, is not good. L. E. 469. 7th edit. lays it down as a rule.

9. Where the evidence proves the effect and substance of the issue,

it is good. L. E. 470. 7th edit. lays it down as a rule.

10. It suffices to prove the substance, without any precise regard to the circumstances. L. E. 471. 7th edit. lays it down as a rule.

## (P. a) Examination of Witnesses.

[ 53 ]

#### After Publication, &c.

1. WITNESSES after hearing, examined ad informandum conscientiam judicis. Toth. 287. cites Dalby v. Mare.

2. After interrogatories preferred in the country by the defendant, he may examine other witnesses, either in Court, or by commission. Toth. 287. cites Long v. Long, about Hill. 7 Ja.

3. Witnesses, after a hearing, re-examined to clear the matter, by the advice of the Ld. Ch. J. and Ld. Ch. B. Toth. 288. cites Dux Lenox contra Dom. Clifton, 8 Jac. lib. a. fo. 381.

4. Witnesses examined in the country, if the other side have feen their interrogatories not to be examined in Court. Toth. 287. cites Hungate v. Crook. Trin. 11 Ja.

5. After publication, examined witnesses. Toth. 287. cites

Hancorne v. Emery. Mich. 3 Car.

6. Witnesses examined after publication allowed. Toth. 287.

cites Weeks v. Thelwall, 9 Car.

7. Witnesses examined upon new interrogatories, after a commission to counterprove a man's testimony at law, upon which a verdict. Toth. 288. cites Tailor v. Tailor, 9 Car.

8. Examination of a witness, as after a hearing, to prove a Court-Roll. Toth. 288. cites Veizy v. Veizy, Mich. 14 Car.

9. If one of the parties after publication has an order to examine, on making the usual oath of not having seen the depofitions, the other party may not only cross examine, but examine at large. North K. Vern. 253. pl. 245. Mich. 1684. Anon.

10. A witness alledged he had mistaken himself at a commission, Nels Chan. the commission being returned, he came to London, and made Rep. 92. S. eath that he was surprised; a special commission issued to re-ex- ingly. amine this witness, which was done accordingly; but this special Chan. commission was suppressed by motion, by advice with the Master of Cases, 25. the Rolls, with the Six Clerks, as contrary to the course of the cordingly. Court. 2 Freem. Rep. 178. pl. 241. Pasch. 1692. Randall v. Equ. Abr. Richford.

S. C.-Bu: ibid. in a note on the margin, fays, that it is now the practice of the Court to obtain an order upon

motion, and affidavit of surprize, to have the witnesses examined viva voce in Court, or his deposits tions amended, the witness being first examined before an examiner; but when he is examined in Court, or when his depositions are read, the order for that purpose must be produced in Court,

Gilb. Equ. Abr. 233. pl. 3. S. C. in totidem verbis.

11. Interrogatories, and the depositions of witnesses taken on them Rep. 150. were suppressed, for that the interrogatories were leading, and then tidem ver- publication passed; and on motion that a new set of interrogatories bis .- Equ. might be drawn and fettled by a Master, for the examination of this witness, whose evidence was very material, and yet must be wholly loft, if the Court would not indulge him this way; and though the practice has been always against it, and it was infifted to be of dangerous consequence, yet one precedent being produced to this purpose, and the interrogatories which had been suppressed were such as might have been drawn by many other counsel without any apprehension of their being leading, the Court, to let in the party to the benefit of this witness's tellimony, ordered interrogatories to be put in, and fettled by a [ 54 ] Master for his examination over again. Chan. Prec. 493. pl. 307. Trin. 1718. Spence v. Allen.

12. Articles never are to be exhibited against the credit of a witness, after such witness has been cross-examined to the merits.

MSS. Tab. April 19th, 1726. Oneal v. Odair.

13. After the defendant has been examined on interrogatories, and publication passed, the plaintiff ought not to have a commission to examine witnesses, in order to falsify the defendant's examination, this tending to multiply causes, and make them end-3 Wms's Rep. 413. Hill. 1735. Smith v. Turner.

14. Upon a motion. After a decree and account before the Master, one of the parties had examined witnesses, and after the other fide had taken a copy of depositions, he exhibited interrogatories, and was about to examine witneffes in contradiction, &c. And now it was moved, that the party who had taken a copy, might be staid from examining witnesses in contradiction, or that Master might settle interrogatories. Lord Chancellor. Although no passing publication before the Master, yet examining after party has feen depositions of other side feems to be within the same mischief and danger, and though in account, before Master, by reason of many items and particulars, parties may examine at several times as occasions offer; yet when one party has closed examination, as to any particular point or fact, the other fide ought not after feeing these depositions to be admitted to examine in contradiction. But in the present case, as the solicitor had made outh, that he was informed the practice was otherwise, and that he might examine after feeing the depositions, and as the notice of motion was in the alternative, therefore let the Master settle the interrogatories. Mich. 1734. Charlewood v. St. Amand.

### (P. a. 2) Re-examination. In what Cases.

ADLOW being examined as a witnefs, calling himfelf better to mind afterwards, was suffered to amend his former examinations, and was further examined ad informandum. Toth. 286. cites Trin. 27. Eliz.

2. A witness once examined shall not be called up to be examined Long v. upon a further point. Toth. 286. cites Ld. Scroop v. Sir Tho. trary, about Egerton.

Hill. 17 Jac.

but Anguish v. Trevor, not admitted, in Mich. 19 Jac. Toth. 287.

3. Witnesses examined to the damage on breach of covenant, not re-examined on the same interrogatories, though speaking in the first uncertainly. 2 Chan. Cases, Pasch. 28 Car. 2. Inglet v.

Inglet.

4. A witness alledged he had mistaken himself at a com- But it is the mission, the commission being returned, he came to London of the Court and made oath that he was furprifed; a special commission to obtain an iffued to re-examine the witnesses, which was done accord- order on ingly, but this fpecial commission was superfeded by motion, by affidavit of advice of the Master of the Rolls, with the Six Clerks, as con- furprize, to trary to the course of the Court. Chan. Cases, 25. Trin. have the 15 Car. 2. Randal v. Richford.

voce in Court, or his depolitions amended, the witnesses being first examined before an examiner; but when he is examined in Court, or when his depositions are read, the order for that purpose must be produced in Court. Abr. Equ. Cafes, pl. 3. marg.

5. Baron and feme exhibit a bill for a demand in right of the [ 55 ] wife, the defendants answer, and witnesses are examined, and publication passed, but before hearing baron dies, and the marries a second husband, and they bring a new bill for the same matter; per Cur. the wife was not bound by the former proceedings, and therefore the now plaintiffs were allowed to examine, as if no examination had been in the former cause, per Lords Commisfioners. 2 Vern. 197. pl. 180. Mich. 1690. Anon.

6. In a bill to have the benefit of a former decree, plaintiff cannot examine witnesses, much less the same witnesses, to the matters in iffue in the former cause; but on such bill the Court may examine the justice of the former decree; but then it must be on proofs taken in the cause wherein the decree is made; per Wright

K. 2 Vern. 409. Hill. 1700. Johnson v. Northey.

7. Where the baron and feme exhibit a bill for a demand in right of the wife, the defendants answer, and the cause being at iffue, feveral witnesses are examined, and publication past, but before it proceeds to a hearing the husband dies; the wife marries a second husband, and they bring a new bill for the same matter. It was moved they might be restrained from examining the witnesses examined in the former cause, but not allowed by the Court; the wife wife was not bound by the proceedings in the former cause, and therefore examine as if no examination had been in the former cause.

2 Vern. 197. pl. 180. Mich. 1690. Anon.

8. Holt faid, it was frequent in Chancery, after a witness had been examined before a Master, to examine him again viva voce in Court; but Serjeant Powis replied, it was no frequent thing so to do, in all his time he had known it done but twice. 7 Mod. 157. Hill. 1 Ann. B. R. in Case of Grovenor v. Fenwick.

9. A witness examined was refused to be read because interested, but on a release given by him may be examined again, and though there be no order of Court for such re-examination, yet if the other side does not move to suppress the deposition for want of an order, it is too late to object to it when the deposition comes to be read. Chan. Prec. 234. pl. 196. Pasch. 1704. Callow v. Mime.

10. Depositions taken de bene esse shall not be published without affidavit of the parties death, and that he died before he could be examined in chief. Sel. Cases in Chanc. in Ld. King's time. 11. Pasch.

11 Geo. 1. Cox v. George.

Chan, Prec. 493. pl. 307. S. C. accordingly. Rep. of Cafes in Equity, 150. S. C. accordingly. Equ. Abr. 232. pl. 3. S. C. accordingly.

II. Motion to re-examine witnesses to the same matter they were formerly examined to, the former depositions being suppressed after publication, upon the Master's report that the interrogatories were leading, &c. The Case of Bawd v. Amhurst tempore Cowper C. was cited as directly in point, and insisted that the intire equity of the cause depended upon the evidence of these witnesses, and that it would be extremely hard that the plaintiff should be for ever debarred of his right by a slip of the counsel, &c.

Contra it was infifted, that this motion was directly contrary to the standing rules and orders of the Court, that a witness ought not to be examined again to the same matter after his deposition is suppressed; that in two late Cases, viz. Harding v. Coaketer, and Dolbin v. Addison, this matter was very earnessly pressed by the counsel, but in vain, and denied by the Court; that it would be of dangerous consequence to allow a witness to be re-examined upon new interrogatories after he has been drawn in to make a deposition upon leading interrogatories, for he must swear the same thing over again to secure himself

from an indictment of perjury, &c.

Parker C. ordered the interrogatories and depositions to be read, and then said, it is not so clear that these interrogatories are leading, though perhaps in strictness they may be, yet probably counsel may think them right, and so sign them, without any design to lead the witnesses, and it would be hard the plaintist should lose the benefit of these witnesses by such a slip or mistake of the counsel, especially in this Case; so here the depositions seem very fair and honest, and not at all instruced by the leading part of the interrogatories, if the witnesses should swear directly to the leading part of the interrogatories, that might be a reason not to allow them to be re-examined; but that is not the case,

here the point in issue is, if bond taken in the plaintiff's name, and found among the papers of the defendant's testator, were a trust for the defendant or not, and perhaps the witnesses examined are the only persons that can give any evidence of this matter, and unless he can have the benefit of their testimony he is without remedy, and therefore he ought not to be deprived of their testimony, since the interrogatories themselves are not unfair, but rather unskilfully drawn, and the depositions thereupon seem honest, and not in the least influenced by the leading part of the interrogatories.

Leave was given to re-examine the former witnesses to the same matter upon new interrogatories, to be settled by the Master. MSS.

Rep. Trin. 4 Geo. in Canc. Spence v. Allen.

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VOL. XII.

# (Q. a) Presumptive Evidence. What shall be admitted. By Reason of Length of Time, &c.

1. If a deed be proved to be delivered but not when, it shall be intended to be delivered the day it bears date; per Coke, and directed the jury accordingly. I Roll. Rep. 3. pl. 5. Pasch. 12 Jac. B. R. Stone v. Grabham.

2. The jury may find a thing upon presumption, but the Court ought to judge only on what appears in the record. I Roll. Rep. 132. pl. 9. 132. in Hill. 12 Jac. B. R. Isack v. Clarke.

3. A deed of feoffment of forty years may be given in evidence, though it cannot be proved that livery was made, yet, if possession bas always gone according to the deed, it is good evidence to a jury to find livery. I Roll. 132. Hill. 12 Jac. B. R. in Case of leack v. Clarke.

4. Bill against an executor, for performance of articles made with testator fifteen years ago, in which he was bound to pay 6081. to, the plaintiff, who acknowledged a receipt of the whole, viz. 4001. in money, and the rest by a conveyance of lands. But those lands being settled on the wise in jointure, the plaintiff brings his bill. It was decreed, that the plaintiff having acknowledged the receipt of 60001 that is an evidence of the performance of the articles, since the plaintiff made no further demand for several years, and it is unreasonable to put an executor to prove a precise payment, after so long a time. Fin. R. 246. Hill. 28 Car. 2. Duke of Newcastle v. Clayton.

5. Cessuy que trust, many years since, granted leases on great fines and at low rents, which he had no power to do, unless impowered by the trustees, which did not appear; but the Court said, they would presume, that cessuy que trust, had some conveyances from the trustees to enable him, and the rather, because it was offered as proof, that it had been the opinion of two eminent counsellors, that he might make the leases, and that therefore they would presume there was a further deed from the trustees to im-

to im- [ 57 ]

power them, which is concealed. Skin. 77. pl. 19. Mich. 34 Car. 2.

B. R. Lady Stafford v. Luellin.

6. In the Case of water-bailage in the city of London, evidence of constant payment, and their ancient tables of duties imported, was judged sufficient, though it was urged there could be no prescription for it, and judgment was accordingly pro defendente. 2 Show. 48. pl. 33. Pasch. 31 Car. 2. B. R. King v. Carpenter.

7. Sixty years ago, lands were limited to trustees to pay debts, remainder to A. in tail, remainder to B. in tail. A. had possession, and in consideration of 800l. portion, on marriage made settlement, &c. and common recovery suffered, wherein one Moor was tenant to the precipe, who vouched A. and he the common vouchee; ejectment by remainder-man after A. who died without issue. But it being a great while since that recovery was suffered, a deed for making Moor tenant to the precipe was presumed, and that debts had been some way or other satisfied, seeing A. had had a possession for a great while, and it shall be taken that the 800l. received, went to discharge debts, and plaintist was nonsuited. Coram Baron Price, Wells Ass. Trin. Vac. 1709.

8. Mutual benefit, is evidence of an agreement, as suppose two men front a river, and each of them has land between them and the river, and they cut through each others ground for water, and that continues twenty years; Ld. Cowper said, he would presume an

agreement. G. Equ. R. 4. Hill. 6 Ann.

9. Upon a trial at bar, a deed was offered in evidence, executed thirty-fix years ago, without proving the hands, which was opposed by the other side, but admitted by the Court, who said, there was no fixed rule about it, but that it had often been allowed, where the deed was but twenty-five or thirty years old. MSS. Tab. Pasch. 11 Geo. 2. B. R. Porter v. Gordon.

## (Q. a. 2) Evidence sufficient.

### Good by Intendment.

I. I N an ejectment, the plaintiff declared upon a lease made and delivered the day of the date, but the witness who was to prove the deed, said he saw the deed delivered, but could not swear it was delivered the same day it bore date. Coke directed the jury to find it was delivered the day of the date, for being proved to be delivered, it shall be intended to be delivered the day of the date. I Roll. Rep. 3. pl. 5. Pasch. 12 Jac. B. R. Stone v. Gubham.

2. The defendant pretended a title, as heir at law to P. under whose daughter the plaintiff claimed. On proof of it, the defendant recovered some verdicts at law, but the pretended place of his birth being a mean place, and but seven miles from his mother's

mother's house, and those verdicts being grounded on depositions formerly taken in this Court, where the record of the bill and answer could not be found, and the witnesses at the trial being of indifferent credit, and because on an office at the father's death, the daughter was returned heir, and no claim made by the fon for feven years, and for that, feveral persons claimed under her title; and at the last trial, the jury were credible perfons, and declared, that for twenty years and upwards, the daughter was reputed the right heir, and therefore the possession [ was decreed to the plaintiff. Melf. Ch. R. 7 Car. 1. Floyer v. Strackley.

3. In an action of trover and conversion, and nothing proved An actual but a tortious taking of cattle by way of trespass, and driving them taking is eway; and it was ruled a good ground for this present action, dence of a and a conversion shall be intended; otherwise when he comes to conversion them by trover, there an actual conversion shall be proved; per without Holt Ch. J. 6 Mod. 212. Trin. 3 Ann. B. R. in Case of Bald-demand and win v. Cole.

is an actual

conversion; but where the thing comes by trover, there must be an actual demand. Sid. 264. pl. 15. Trin. 17 Car. 2. B. R. Bruen v. Ree.

4. In an ejectment, title was made by the plaintiff, as leffee for two thousand years of lands in C. in W. which the defendant would prefume was revoked, shewing a will, charges, and fettlements, made afterwards by the mother who was feifed in fee; but per Cur. revocation, or furrender, shall never be intended without proof that it was actually done. 2 Keb. 483. pl. 22. Pasch. 21 Car. 2. B. R. Moreton v. Norton and Thorner.

5. An interlineation, without any thing appearing against it, will be prefumed to have been made at the time of the making of the deed, and not after. 1 Keb. 121. pl. 62. Pafch. 13 Car. 2. B. R. Trowel v. Caftle.

6. If an arrest be by process out of an inferior Court in a cause Skin. 49. not arifing within their jurisdiction, the party arrested may have Pl. 3. Eliot an action against the plaintiff, who shall be intended conusant S. C. acwhere the cause of action arose, but not against the judge or of- cordingly. ficer who has entred the plaint, or the officer who has executed it, but the proper and just remedy is against the plaintiff. 2 Jo. 214. Trin. 34 Car. 2. B. R. Olliet v. Beffey.

7. In a mayhem, a trespass is necessarily supposed; per Cur.

Skin. 49. Trin. 34 Car. 2. B. R. in Cafe of Foot v. Rastal.

8. But in trover, a trespass is not necessarily supposed, for trover will lay where trespass will not; per Cur. Skin. 49. in

9. Where a recovery in trespass is pleaded in bar, it shall be intended, that the party was recompenced, though otherwise where a bar in trespass is pleaded in bar; per Pemberton Ch. J. Skin. 49. Trin. 34 Car. 2. B. R. in Case of Foot v. Rastel.

10. It shall be presumed, that a child born after a divorce a

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delace his er's mensa & there is a bastard, unless the contrary is proved on the other side. Hawk. C. L. 330. says it was lately so resolved.

Queen v. Inhabitants of Westminster.

11. A title was made from the Black Prince, which could not be out of him but by an act of parliament; but yet, because the possession had gone otherwise ever since, the Court presumed that there had been such an act of parliament, though not now to be found. Skin. 78. Mich. 34 Car. 2. B. R. cites Farcar's Case.

## [ 59 ] (R. a.) Evidence. Supplied. In case of Necessity.

1. WHERE the nature of the thing in demand makes a man to fail of his proof, there the law will fupply it. Per Doderidge J. 2 Bulft. 310. and cites Fitzh. Corone, pl. 323. In an appeal of robbery against one who took from him certain sacks of corn, and prayed to have restitution of his corn. Inchden there demanded, if the corn was still in the sacks or not, for if out of the sacks, it would be very hard to make restitution, and there he restored according to the value of the corn; and with this agrees 7 E. 6. Br. Tit. Restitution, pl. 22. This was so at the common law, and not upon the statute of 21 H. 8. cap. 11. which gives writs of restitution to the party robbed, and it was before here agreed in this Court, that a man shall have restitution, notwithstanding the property is not known, but he shall have like in value, and where there is a desect of proof, the law

shall supply this.

2. In ejectment for the rectory of Burghfield in Berks, at a trial at bar, the case was, that the Earl of - being a Popish recufant convict, presented the lessor of the plaintiff, who was thereupon instituted and inducted; but the record of this conviction being, as was supposed, burnt in the fire, in the Inner Temple, the defendant offered to prove it by the estreat thereof, into the Exchequer; and by an inquisition found, and returned into that Court, of recusants lands; and it was held by Hale Ch. Baron, and the whole Court, that in such case, a record may be proved by evidence, because the conviction is not the direct matter in iffue, but only an inducement to it; as if an approbation was in iffue, the King's licence, if it cannot be found on record, it may be proved in evidence without shewing a record of it, though it is the foundation of the appropriation, so where Sr. Paul Pinder's in trover for goods, the proof depended on a fieri facias, and venditioni exponas, and because the fieri facias could not be found on record, it was allowed to be proved in evidence, but then the evidence must be very strong. Accordingly the conviction was admitted to be read in evidence, but because by the estreat of the conviction into the Exchequer, it appeared to be at the same assises, as which the party was prefented as a recufant, which is not allowed, either by the statute, 23 or 29 Eliz. For a proclamation is directed to be made at the same assises, &c. that the body of

the defendant shall be rendered to the sheriff of the same county, before the next assists, &c. and therefore it was held, that the conviction was not well proved, and the jury found for the plaintiff. Hardr. 323. Pasch. 15 Car. in Scacc. Knight v. Dauler.

3. In an action of trover and conversion for goods, the proof depended on a fieri facias, and a venditioni exponas; but because the fieri facias could not be found upon record, it was admitted to be proved in evidence. Hard. 223. Pasch. 15 Car. in Scacc.

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4. A. in consideration of 5001. in money and goods which he is to have with his wife, makes a settlement, and also impowers her to dispose of 2001. by will. The wife fifteen years after the marriage died, and disposed the 15001. by her will. The legatees after so many years, shall not be put to prove that the husband received 5001. And the Master of the Rolls, upon a presumption that he did receive it, decreed the 2001. to be raised with interest from the end of the year after the wise's death, and with costs. 2 Wms's Rep. (618) Trin. 1731. North v. Ansell.

## (S. a.) Order of giving Evidence.

[ 60 ]

### Who must begin and end.

1. O N a fcire facias the defendant pleaded plene administravit, and the plaintiff replied assets, on which they were at iffue; and in giving evidence to the jury, the defendant began first; nota quia extra ordinem credo, because it was in the negative. Dyer 80. pl. 53. Hill. 6 & 7 Ed. 6. Dean and Chapter of Exeter v. Trewinnard.

2. In a writ of right, quia dominus remisit curiam, the tenant ought to give his evidence first, because the mise is joined by him

first. Dy. 247. b. pl. 75. 8 Eliz. Spyrtie v. Mead.

3. So in a writ of right, demanding a third part of so many acres of land, because the defendant is in the affirmative. 3 Leon. 162. pl. 211. Hill. 29 Eliz. C. B. Heidon v. Ibgrave.

4. In a writ of right the defendant shall not give his evidence first, for the tenant affirms that he hath more right, and that ought to be first proved. Goldsb. 23. pl. 2. Trin. 28 Eliz. Heydon v. Ibgrave.

5. Per Cur. he who affirms the matter in iffue ought to begin Golds. 22. to give evidence. Litt. Rep. 36. Trin. 3 Car. C. B. Anon.

pl. 2. S. P.
accordingly.

-3 Le. 162. pl. 211. Hill. 29 Eliz. S. C. accordingly. Trin. 28 Eliz. pl. 2. Heydon v. Ibgrave,
S. P. accordingly.

Company.

6. The counsel of that party which doth begin to maintain the issue, whether of plaintiff or defendant, ought to conclude. L. E. 5. pl. 11. Trials per Pais, 220.

7. This was an iffue out of Chancery that came to be tried at

the bar; and it was, whether one Mrs. Bruerton was of found memory at the time of her executing feveral deeds; and because the execution of the deeds was at several times, there were four issues, but each of them turned upon that single question, the defendant was to prove that she was of sound memory, the plaintiff that she was not; and the counsel of each side argued who should produce their evidence first; and the Court took this difference, that if there is one affirmative in any of the issues, the plaintiff shall first go through his evidence as to all of them; but in this case the affirmative through the whole lies upon the defendant, and therefore he shall go first through his evidence. I Barnard. Rep. in B. R. 12 Pasch. 13 Geo. 1. Tyrell v. Holt and Hopley.

## (T.a) Evidence. At what Time it must be given.

1. A Privy verdict was given in B. R. for the defendant, but afterwards, before the inquest gave their verdict openly, the plaintist prayed that he might give more evidence to the jury, he having (as it seemed) discovered that the jury had found against him, but the justices would not admit him to do so; but after that Southcote J. had been in C. B. to ask the opinion of the justices there, they took the verdict. Dal. 80. pl. 18. Anno 14 Eliz. Anon.

[ 61 ] 2. Where evidence may be given, after the prosecutor has re-

plied. L. E. 4. pl. 7. cites State Trials.

3. Per Cur. If an executor suffer judgment to go against him by default upon executing a writ of enquiry, he shall not give evidence of want of assets, for he is estopped, as if it had been the case of an heir; for he should have pleaded plene administravit, or especially what assets he has. 6 Mod. 308. Mich. 3 Ann. B. R. Treil v. Edwards.

4. When once a person has entered upon evidence by deed, he cannot afterwards, if he sails of that evidence, go to parol evidence of that sail. Barnard. Rep. in B. R. 8 Mich. 13 Geo. 1. The King v. Rich.

## (U. a) What must be produced in Evidence. As Papers, Deeds, &c.

1. NOTE, Upon evidence to a jury, between B. and W. upon the diffolution of a vicaridge, in the county of Warwick, which was part of the priory of Dantry, where the Pope by his bull, gave to the vicar minutas decimas & alteragium, and it was certified by the doctors, that alteragium will pass to the vicar, tithe-wool, &c. And the usage was shewed in evidence, and the copy of the Pope's bull; and the Court would not credit that, without

without feeing the bull itself; and so the party was nonsuit, and the jury was discharged. Winch. 70. Hill. 21 Jac. C. B. Bret v. Ward.

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2. When a release is pleaded, be it a release after disseisin, or before disseisin, without shewing it to the Court, though the jury find it none, being shewn to the Court regularly, it is worth nothing, for the Court ought to judge what force this release has in law. Jenk. 19. pl. 35.

3. But in cases where charters have been lost by fire burning of houses, rebellion, or when robbers have destroyed them; the law in such cases of necessity, allows the proof of charters without shewing them. Jenk. 19. pl. 35.

4. If one do produce a lease made upon an outlawry, in evidence to the jury to prove a title, he must also produce the outlawry itfelf, for the outlawry is the ground of the lease, and by consequence of the title which is to be proved; but if he produce the lease to prove other matter, he need not shew the outlawry, but may have the lease only read in evidence; but in both cases he must prove the lease. L. P. R. 553.

5. And so it is of an extent, for at the trial, the plaintiff must prove by an exemplification, or examined copy of the statute, or judgment on which the extent is grounded. So held in a trial at the bar, between Johnson and Spencer. L. P. R. 553. cites Pasch. 1655. B. S.

6. In an action of debt for rent, upon a lease-parol, and nil debet pleaded, the plaintiff must, if it be insisted upon, shew his title to the land; but upon a lease for years under hand and seal, he need not, because the desendant hath estopped himself by accepting a lease, and sealing a counter-part. L. P. R. 553.

7. If a parson brings an action of debt for tythes upon the statute, upon nil debet pleaded, he must, if the defendant puts him to it, prove his institution, and induction, and reading of the thirtynine articles, otherwise he will be nonsuited, for that is his title to the tythes. L. P. R. 553.

8. In debt against executors, who plead plene administraverunt, the plaintiff replied assets at the day of the original, scilicet, such a day, and on this they were at issue; and on trial at Middlesex before the Ch. J. the plaintiff was nonfuited for not producing the bill; on assidavit of this, motion was made for a new trial, and Twisden, and Windham being only then in Court, said, that the plaintiff needed not to produce the bill at the trial; and therefore if the plaintiff was overruled in it, he ought to have tendered a bill of the exceptions, but shall not have a new trial. Sid. 226. pl. 21. Mich. 16 Car. 2. B. R. Rogers v. Rogers.

9. One shall not give in evidence, an account of the substance of a letter, without the shewing of it, or informing of the Court how it came to be lost. L. P. R. 553. cites Trin. 9 W. B. R. at Guildhall.

10. The sheriff upon assignment, does not part with the possession of the bond, because if the plaintist be nonsuited, the sheriff F 4 must

must be indemnissed, but he must produce it at the trial; per Holt Ch. J. 12 Mod. 527. Trin. 13 W. 3. Anon.

## (X. a) Evidence. Good by Confent.

1. A Rule of Court was made by confent, that a deed should not be given in evidence at the assist without proving the execution of it. Sid. 269. pl. 23. Trin. 17 Car. 2. B. R. Anon.

2. Examination of witnesses cannot be by consent of parties before any judge that is not of that Court out of which the cause went to
the assists; by Twisden and Foster; because the depositions are
not taken before him, as judge of assist, but as judge of this
Court; contra by Windham; but per Cur. though one consent
to have a letter read, yet the jury on pain of attaint are not bound
to find it, therefore it was agreed that a bill should be exhibited in
Chancery, and answered, and commissions by consent go out
thence into the country, to examine such witnesses in the country, whereby the depositions may come in hither judicially. 1 Keb.
249. pl. 12. Pasch. 14 Car. 2. B. R. Frankland v. Savill.

3. Though an affidavit was made, that the witnesses now in town living in Wales, could not be had at the assistance, yet Hyde refused to examine them by consent of parties, as used in C. B. I Keb. 787. pl. 38. Mich. 16 Car. 2. B. R. —— v. Kelly.

4. Nota pro regula. Examination of witnesses by interrogatories out of term, by Foster Ch. J. is extrajudicial, and not to be allowed, though the party consent. Contrary by Twisden and Windham, consensus (if according to law) tollit errorem; and the Court may as well allow the examination of witnesses before a judge by depositions, as read the assidavit of a person absent, this is no more than the law allows. Keb. 36. pl. 98. Pasch. 13 Car. 2. B. R. Blake v. Page.

5. The defendant prayed, that the trial might be stayed on suggestion, that his material avitnesses were mariners, and now going to sea with the sleet, and would not be ready till Michaelmas term next. The Court agreed to examine the witnesses by confent of parties, before the Ch. J. the trial being to be before him; and the plaintiff, if he will, may cross-examine them. 2 Keb. 13.

pl. 32. Pafch. 18 Car. 2. B. R. Catlin v. Pidgeon.

6. It was objected, that in an indictment, evidence of discourse preceding, the fact is not to be given; but Holt said, that they might give in evidence any thing that explains the fact. 11 Mod. 229. pl. 2. Trin, 8 Ann. B. R. in Case of Young v. Slaughtersord.

#### (Y. a) Variance between the Evidence and the Declaration, &c.

I. IT was the opinion of all the judges in the C. B. that if a D. 219. b. man fells two horses for forty shillings, and the plaintiff in pl. 11. an action of debt, declares on the buying of one horse for forty shillings, the defendant may plead, nil debet, and the jury must find for him under pain of attaint, for here the words modo & forma are material, the contract not being the fame that was between the parties. 21 Ed. 4. pl. 2.

2. So if he had bought one horse for forty Shillings, and the plain- D. 219. tiff declared on a contract for two; or if there was an ox bought, cites S. C. and the declaration was for an horse; and so in every case, when

the plaintiff varies from the contract. 21 Ed. 4. 2.

3. Detinue of a chain containing three ounces, where in truth it contains but two; the defendant may fafely wage his law. 22 E. 4. 2. b. pl. 8.

4. But otherwise it is if the variance be only in the value of

the chain. 22 E. 4. 2. b. pl. 8.

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5. So of a horse, as to the value. But if the count be of a black borse, and the jury find it to be a white horse; this is against the

plaintiff. 22 E. 4. 2. b. pl. 8.

6. Per Finchden, on a declaration on a bond, supposed to be made by two, if non est factum is pleaded, and it is proved to be the deed of one, and not the other, yet the plaintiff shall recover against him whose deed it is. L. E. 206. pl. 20.—cites 40 Ed. 3.35.

7. Trespass in D. without addition, and there is no D. without addition; yet if he prove trespass in D. it will be for him. 12 Mod.

508. cites 9 H. 6. 5.

8. In account, the defendant pleaded, that he accounted before A. and B. upon which issue was joined, and it was found that he accounted before A. only, yet judgment for defendant. Hob. 55. cites 46 E. 3. 5. in Case of Foster v. Jackson.

9. In debt upon obligation, he pleads, non est factum, upon which they were at issue, and the witnesses say, that it was delivered at York, which is another place than where it bears date, it does not

warrant the issue. 2 E. 6. 7. 31 H. 6.

10. In debt upon an obligation against Oliver St. John, and Alice his wife as heir of her father, the defendant pleaded non est factum of the father, and it was found by special verdict, that the obligation was made by the father of the wife to the plaintiff and another, whereas in truth, the plaintiff hath declared upon an obligation made to himself only, without speaking of any other joint obligee, and that the plaintiff as furvivor hath brought the action, and if upon the matter, it shall be faid, the deed of the defendant, in manner as the plaintiff hath declared; the jury refer

unto the Court, and the Court was clear of opinion, that the plaintiff ought to have declared upon the special matter. I Le. 322. pl. 453. Mich. 30 & 31 Eliz. C. B. Dennis v. St. John.

[ 64 ]

11. In ejectione firmæ, the plaintiff declared upon a leafe, made 14 Jan. 30 Eliz. to have from the feast of Christmas then last before for three years, and upon evidence, the plaintiff shewed a leafe bearing date the 13 day of January the same year, and it was found by witnesses, that the lease was fealed and delivered upon the land, the 13 day of January. Anderson Ch. J. said, that the evidence was good enough to maintain the declaration, for if the lease was sealed and delivered the 13 of January, it was then a lease 14 January, quod cæteri justiciarii concesserunt. 4 Le. 14.

pl. 52. Mich. 32 Eliz. C. B. Price and Foster.

12. The plaintiff declares, that whereas there was an issue joined in ejectione firmæ, brought by the lessee of the plaintist against the desendant, which the lessee intended to try at the next assistes, in consideration the plaintist and his lessee at the assistes would forbear to enforce their title, and give but weak evidence against the desendant, he promised to pay him a certain sum of money. On non assumpsit pleaded, there was a special verdict, which sound the assumpsit in all points, only there were two issues joined in the suit, and the assumpsit was in consideration of forbearance to enforce the title at the trial of both issues; and it was adjudged for the plaintist, because it is said in common parlance, that the parties have joined issue, and it may well enough stand upon two issues as well as one. Mo. 351. pl. 471. Hill. 36 Eliz. B. R. Blackwell v. Eyre.

13. A woman, in an ejectment brought against her, pleads a custom in the manor, that the widow of every copyholder in seefimple, see-tail, or for life, should enjoy the copyhold for term of ber life, and the custom was traversed; and on evidence at nisperius to maintain the custom, they proved she claimed the estate only during her widowhood; and on this evidence, the plaintist demurred; and it was adjudged by the Court, that the same evidence did not maintain the custom pleaded; for the evidence was of an estate only during her widowhood; and the custom pleaded, was for the estate during her life, which is a greater estate. Dy. 192. a. pl. 23. Mich. 2 & 3 Eliz. Lynsey v. Dixon.

14. In an action for forging a deed. The declaration was on a demise of a manor, & terras dominicales, and upon not guilty pleaded, the plaintist gave in evidence, a demise of the manor, of omnes terras dominicales, except two closes; it was held, per totam Curiam, that the evidence was good enough, for it is not necessary to construe terras dominicales, to be omnes terras dominicales; for the lands not accepted, are terras dominicales, and that will maintain the declaration. Le. 139. pl. 192. Hill.

30 Eliz. C. B. Atkyns v. Hales.

15. A covenant was, that leffee for years, should not cut any trees fo as to commit waste, and gave bond for the performance. In debt

Ibid. cires the S. P. adjudged.

debt upon the bond, the plaintiff affigned the breach, in cutting Trin. 22 twenty oaks, by which ther were wasted. The defendant pleaded, that he did not cut the fail twenty oaks, nor any of them, modo & v. Elliz .forma prout, &c. The phintiff rejoined, that he cut twenty oaks prout, &c. The jury found that the defendant cut ten, and judgment was given for the plaintiff. D. 115. b. pl. 67. Pasch.

2 & 3 W. & M. Torill v. Dunt.

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16. Assumplit was, to teliver certain monies to the plaintiff in London, when he delivered to the defendant certain broad-cloths there. The defendant pleaded non affumpfit, and it was found specially, that the assumplit was, that the plaintiff should deliver certain broadcloths of a pheafant colour, and others of other special colours. The Court thought, that the special matter is good maintainance of the declaration, and that the defendant ought to have faid by w y of answer, that the assumpsit was so special, and have traveried the general assumplit in the declaration. Mo. 466. pl. 659.

Pafch. 39 Eliz. Cheney v. Hawes.

19. In an action upon the case for disturbing the plaintists, and [ 65 their children and family, in the possession of a pew, in the church of Berkenham, the decaration fet forth, that they, their ancestors, and all those whose estates they had, had always enjoyed that pew to fit in the faid church, appertaining to the manor, to which the advowson is appendant; that they are lords of the manor, and founders of the church; the defendant prescribes to the pew, as appertaining to his house, absque hoc that the plaintiffs, their ancestors, or those whose estates they have, had the seat modo & forma, as is fet forth in the declaration; and on this issue was joined, and the evidence proved them to be tenants in common, which was held to maintain the iffue, by Ch. J. Houghton and Chamberlain; fo the plaintiff was nonfuit. Dodderidge dissentiente. Palm. 161. Pasch. 19 Jac. B. R. Snelegar v. Brograve.

20. An ejectione firmæ and a trial at bar, The plaintiff had de- 2 Brown! clared of a leafe made to him by baron and feme; and that he being 248. S. C. out of possession they had made a letter of attorney to enter, and to cordingly. deliver that leafe, and that they had sealed, and delivered it. And now ruled that the declaration is naught, because it is not a leafe of the wife, but of the husband only; and so it hath been adjudged in one Rich's Cafe. And the letter of attorney of the wife is word, because it is only executory. And the counsel of the plaintiff confessed that it hath been adjudged accordingly. Noy. 133.

5 Jac. Phimmer v. Hockett.

21. Ejectione firmæ of a leafe of Lucy Lady Griffin, the 7th of Jan. 19 Jac. by indenture dated the 6th of December, 19 Jac. habend. a die datus indenturæ præd. Upon not guilty pleaded, and evidence to the jury, the leafe was shewn, bearing date the 6th of December 19 Jac. and the habendum was a tempore confectionis indenturæ, and because a die datus excludes the day, so as it is not the same lease whereof the plaintiff declares, it was held that the plaintiff had mistaken his action, whereof the plain-

tiff was nonsuited. Cro. J. 647. pl. 12. Mich. 20 Jac. B. R.

Scavage v. Parker.

22. In assumptit for 101. due for con fold to four men, and the evidence proved the fale to be made only to two, this was holden against the plaintist, that he did not prove his case. Clayt. 114. pl. 198. Aug. 1647. before Green derjeant, Judge of Assis. Anon.

23. Debt on a bond, and it did appear the defendant and another were bound jointly in this obligation, and it was ruled, that though the other obligor be dead, yet the plaintiff hath failed in his declaration, and if non est factum be pleaded, and this bond produced, it shall be against the plaintiff. Clayt. 119. pl. 210. March 1647.

before Germine J. Judge of Affise. Anon.

24. In an action of debt upon an obligation which was fet forth to be made the 15th of November 25 Eliz. the defendant pleaded non est factum; the jury found a special verdict, viz. that it was dated the 15th of November 23 Eliz. but was not fealed, or delivered, till the 18th of November 26 Eliz. Et si super totam materiam, the Court shall adjudge it for the plaintiss, they find it for the plaintiss, et si, &c. And it being hereupon moved, all the Court without any dissiculty resolved, that this verdict is found for the plaintiss, for the issue being generally non est factum, it appears to be his deed. But peradventure by special pleading he might have helped himsels; wherefore it was adjudged for the plaintiss. Cro. J. 136. pl. 12. Mich. 4 Jac. B. R. Lady Lane v. Pledall.

31. Indebitatus assumplit for 7501. laid out by the plaintist for the use of the desendant; upon non assumpting pleaded, there was a trial at the bar, and the evidence was, that the desendant and another now deceased farmed the excise, and the money was laid out by the plaintist on the behalf of the desendant and his partner, and that the desendant promised to repay the money out of the first profits he received. Per tot. Cur. it would not lie; First, Two partners being concerned, the action cannot be brought against one alone; he ought in this case to have set out the death of the other; but if judgment be had against one, the goods in partnership may be taken in execution. Secondly, The promise here was not to pay the money absolutely, but sub modo; so that the evidence did not maintain the action, and the plaintist was nonsuited. 2 Mod. 279. Mich. 29 Car. 2. C. B. Tissard v. Warcup.

26. If a promise be made to pay at a day certain, and the day is pass, the plaintiss may declare to pay on request; so if he declares on payment at a day certain, and gives in evidence a promise on request, viz. when it is created on account which gives the duty; for there the time is ex abundant; but when the action is founded on the contract it is otherwise, for there the evidence must pursue the contract. Trials per Pais, 3d edit. 184. cites Hill. 1650. B. R.

Child's Cafe.

27. In

27. In affault and battery, there was a demurrer on the evidence; the case was, that the defendant, the day specified in the declaration, alledged that the plaintff affaulted the defendant, and in defence of himself, justifies the leating; the plaintiff replied, De injuria fua propria absque talicausa; and in the evidence, the defendant maintained, that the paintiff beat him the day mentioned in the declaration, and in the same place, whereupon the plaintiff gave in evidence another day, and place viz. &c. which was the cause of the special verdict; for if there are two batteries made between the plaintiff and deendant at divers times, the plaintiff must prove the battery madethe same day as in the declaration, and shall not be admitted to give another day in evidence; per totam Curiam, Brownl. 233. Trin. 9 Jac. Downes v. Skrimsher.

28. If a trespass was done the 4th of May, and the plaintiff alledgeth the same to be done the 5th of May, or the 1st of May, when no trespass was done, yet if upon the evidence it falleth out that the trespass was done before the action rought it is sufficient. Co. Litt. 283. a. ad finem; and fays, that this is warranted by Littleton, S. 435. who speaketh indefnitely, that the jury may find the defendant guilty at another day than the plaintiff

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29. Affumplit for twenty pounds upon accompt, and upon the evidence it appeared to be another sum, and the plaintiff was nonfuit, and the judge held, where a action is for ten pounds upon a contract for a horse, and the winess doth not prove the very fum, but differs a penny or twelve pene, in this case it shall be found against the plaintiff, and cited the opinion of Walter Chief Baron to be so, but for the importmity then was contented a special verdict should be found; but he Court above did rule the case against the plaintiff, quod noa in assumpsit, where damages only are to be recovered; for n fuch case, if debt had been brought, it is clear, because he doth not hit the contract, it Clayt.87. pl. 147. July 16 Car. shall be against the plaintiff. before Foster, Judge of Assife. Ramden's Case.

30. Action upon a promise and seclaration, that the defendant did affure and promise that the defendant would not fue the plaintiff, and the evidence was, that he would forbear his fuit; and this by the judge doth suppose asuit already begun, and so doth not maintain the iffue, and upon this the plaintiff was nonfuit; Clayt. 2. pl. 4. Aug. 7 Car. befor Damport, Ch. B. Judge

of Alife. Anon.

31. The plaintiff declared, that the defendant, in confideration the plaintiff would forbear fuit gainst J. S. for 80 l. which J. S. did owe him, the defendant would fee him paid, and the [ 67 ] evidence proved that J. S. did owe the plaintiff only 40 l. and holden that is against the plaintiff. Clayt. 111. pl. 190. March 24 Car. Turner Serjeant, Judge of Affise. Hargrave's Case.

32. In assumptit for money due, it was laid in the declaration to be payable on request, but by the witness it appeared that a fortnight's

time was given for the payment of it, and though the fortnight's time was past long before the action brought, yet it was now held a failer in the proof of the paintiff of his case as he had laid it. Clayt. 115. pl. 199. Awust 1647. before Green Serjeant at Law, Judge.

33. Indebitatus by A. the defendant gives evidence, that B. was partner with A. at the delivery of the wares, whereupon the plaintiff was nonfuited. Tri.per Pais, 187. cites Lent Asl. 1667,

at Norfolk. Franklin v. Waker.

34. In an action on the case though a request in the declaration is laid at one time, yet a request at another time may be given in evidence, though it be several years distant; per Wild Recorder, and not denied. Sid. 268. Tri. 17 Car. 2. B. R. King v. Bray.

35. A promise was made t the father, on his doing a certain act to pay his two daughters A. & M. 201. a-piece. M. alone brought an action on the promise so her 201. It was objected, that they ought to have joined in theaction; but per Glyn Ch. J. they have distinct interest, and o either of them may bring an action, and it being brought for ae 201. only, judgment was for the

plaintiff nisi. Sty. 461. Mih. 1655. Thomas v. ---.

36. Ejectione firmæ for se many acres of meadow, and so many acres of passure; upon not guilty pleaded, the jury find a demise de berbagio & pannagio of b many acres; and the question was, whether this evidence did, or did not maintain the issue for the plaintiff? The Court include against the plaintiff; first, because by the same reason, hat an ejectment upon a lease of herbage, by the same reason, he plaintiff ought to declare accordingly, as in the case of 27 Hen. 8. where passure is granted for ten oxen, the præcipe mut run accordingly, and so here. Secondly, Herbage does not onclude all the profit of the soil, but only part of it, as I Inst 4. b Adjornatur. Hard. 330. cites I Inst. 4. b. pl. 5. Trin. 15 Car. 2. in Scacc. Wheeler v. Toulson.

37. Award to pay moneyin, or at the house of J. S. The plaintiff faid, that it was not pad at the house, which per Curiam is well enough, and if it wer paid in the house, it may be given in evidence on iffue, that it vas paid at, &c. and judgment for the plaintiff in debt upon bond 1 Salk. 753. Trin. 16 Car. 2. B. R.

Fitzherbert v. Hind.

38. At Guildhall, in ar action for words per quod maritagium amisit, and upon evidence, the plaintiff proved part of the words only, but proved, that by resson of these words maritagium amisit; and ruled by Holt Ch. J. o be well enough, for it is sufficient if the plaintiff proves the los of marriage, by reason of any words in the declaration. Skin. 33. pl. 3. Hill. 4 W. & M. in B. R. Geary v. Connop.

39. If A. pròmise B. ten jounds, in consideration that he would procure him one who would give him an annuity of 100 l. per ann. for 900 l. B. does not do it, but procures him one who grants it for a 1000 l. and A. does agree for that annuity. B. cannot

bring

bring an affumpfit for the 101. because this varies from the contract, but he may have a quantum meruit; per Powel J.

12 Mod. 509. Pasch. 13 W. 3. Anon.

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40. Plaintiff in case declared of an agreement made between him and the defendant, that the defendant would let him have the use of twelve acres of turnips for such a time for his sheep; and [68] the evidence was, that he would let him have twelve acres of turnips; and per Holt, it maintained the declaration, for the land did not pass as it would by grant of so many acres of pasture; but it is like granting of so many acres of corn, whereby the corn only would pass. 12 Mod. 600. At nish prius, coram Holt Ch. J. Mich. 13 W. 3. Anon.

41. In case upon a special promise to deliver good merchandisable wheat, upon non assumptit pleaded at the trial, Lent assists, 12 W. 3. at Bedsord, before Holt Ch. J. the plaintist's witness swore, that it was agreed, that he should deliver good second fort of wheat. And Holt held this a variance, and the plaintist was

nonfuit. Ld. Raym. Rep. 735. Anon.

42. If the iffue is affets at fuch a place, it is good evidence to prove affets at another place; for affets any where, is affets every where.

3 Salk. 156. Mich. 12 W. 3. Anon.

43. In case for refusing goods which the plaintiff had distrained for rent; the plaintiff declared, that he was seised in see of a certain messuage, &c. and so seised demised to J. S. for a year, and fo from year to year, as long as both parties should please, by a parol demife, referving rent, and for rent arrear he diffrained, and the diffress was rescued from him by the defendant, for which the action was brought; and here the plaintiff having laid a feifin in fee upon himfelf, was fain to prove it, and in proving the leafe, it appeared to be for a year, and fo from year to year as long as both parties pleased, and that the leffee should not go away without giving a quarter's warning; and it was infifted on by Eyre and Parker, that the leafe given in evidence, varied from the leafe declared on, so they failed in proving their declaration; but per Holt Ch. J. it is well enough, for the agreement concerning the quarter's warning is only a collateral agreement, not at all affecting the land in point of interest, but collaterally binding the person of leffee, and therefore it need not be mentioned in the declaration. 6 Mod. 215. Trin. 3 Ann. B. R. Dod v. Monger.

44. Indictment for breaking the chamber of cujusdam Sara S. in domo mansionali cujusdam David James, &c. the evidence was, that it was the house of Jamson, not James, and per Parker Ch. J. it will not maintain the indictment, like Roll 667; trespass for breaking plaintiff's close in Calvering in quodam loco vocat. Calverfield, abutting south on a mill in the tenure of J. S. The plaintist must prove the whole abuttment, even its being in the tenure of J. S. So in the Case of the Queen v. Sudbury, indictment for an assault and battery, laid as a riot, two were acquitted, and two found guilty; yet all were acquitted, for the crime was the riot, and the whole charge alledged under that specification and description. So in-

diciment

dictment for acting a play, and speaking words in such a parish in a playhouse in Lincoln's-Inn-Fields, if there be no playhouse in Lincoln's-Inn-Fields, the defendant must be acquitted, for though the words are not local, yet these are made so. If the speaking had been alledged in Lincoln's-Inn-Fields, then it had been laid as a venue; but here it is otherwise, being alledged as a description where the playhouse stood. One may make a trespass local, which is not so. And in the principal case, the chamber was local, but the taking and carrying away goods is not so, but then all is put together as one fact under one description, and you cannot divide them. I Salk. 385. pl. 37. Mich. II Ann. at nist prius in Middlesex. The Queen v. Cranage.

45. In an information for a libel, the variance of the word (nor) for (not) was held fatal upon evidence. 2 Salk. 660. pl. 7.

Mich. 5 Ann. B. R. The Queen v. Dr. Drake.

46. There is a difference between words spoken, and words written; of the former there can be no tenor, [viz. a transcript] for there is no original to compare them with, as there is of words written, and though there have been attempts to plead a tenor of words spoken, it has never been allowed; and therefore, if one declares for words spoken, a variance in the omission, or addition of a word, is not material, and it is sufficient, if so many of the words be proved, and sound, as are in themselves actionable. 2 Salk. 661. pl. 7. Mich. 5 Ann. B. R. The Queen v. Drake.

47. But otherwise in debt upon a bond; for upon non est factum any variance is fatal. Ibid. cites Dy. 75. 3 Cro. 503. Hard. 470.

48. In trespass quare clausum fregit at Needham, a proof of breaking at Needham-market is ill, and the plaintiff must be nonsuit. 2 Salk. 452. pl. 3. Pasch. 5 Ann. B. R. The Queen v. the Inhabitants of Needham-market, Barking, &c.

## (Z. a) Evidence. What must be pleaded, or may be given in Evidence.

but the other may demur upon it; for lay gents cannot discuss matter in law as it seems there, but it is not expressly adjudged there. Br. General Issues, pl. 51. cites 9 H. 6. 33.

2. Waste, &c. A man cannot give in evidence a licence, or a release, or that the ill which he had in trespass of battery was of the asfault of the plaintiff, and in defence of the defendant. Br. General Issues, pl. 90. cites 12 H. 8. 1.

3. Or that he served the writ as sheriff. Ibid.

4. Or that the forester killed the man of which the appeal is brought in the forest, slying, or such like. Ibid.

5. For those are justifications which ought to be pleaded; for they cannot be given in evidence. Ibid.

6. But upon not, guilty pleaded, he may give in evidence matter which

which makes to him title, and proves that he is not guilty, as leafe for

years, and fuch like, &c. Ibid.

7. Scire facias against the successor of a parson, to have execution of certain arrears of annuity recovered against his predecessor, the defendant said, that he at D. in another county resigned into the hands of the bishop, which he admitted, &c. and so he was not parson the day of the writ purchased, nor ever after, and the best opinion was, that this is a good plea, but by some nothing shall be entered, but not parson the day of the writ purchased, nor ever after, and the resignation shall be given in evidence, and it seemed to some, that all should be entered for evidence and plea. Br. Scire Facias, pl. 133. cites 9 E. 4. 49.

8. In trespass it is no plea to say he entered by command of the owner of the land; but the defendant shall plead not guilty, and give this matter in evidence. Br. Gen. Iss. pl. 53. cites 34 H.

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o. Entry in nature of assisted of common, the defendant pleaded non dissertivit, and the plaintiff gave prescription in evidence, and did not alledge it in his count, and yet it was permitted; for it seems that title cannot be made in the count in this action as in the plaint of assisted, and therefore does not lie of the common. Br. General Issue,

pl. 68. cites 4 E. 4. 1.

10. In dower upon the issue ne unques seisse que dower, the defendant cannot prove in evidence that the baron and his sirst wife were seised in special tail, and after made a discontinuance, and took back an estate in see, whereof he died seised, by which the issue who is tenant in tail is remitted, but this should have been pleaded; for he was once seised of an estate whereof the second wife was dowable. [70] D. 41. pl. 1. Pasch. 30 H. 8. Anon.

house is full, and he cannot receive him, yet he that comes puts down his goods, and by the admission of a guest lies with him without the hostler's appointment, and his goods are stolen; in an action against the hostler he may plead the general issue, and give this in evidence. Bendl. 60. pl. 103. Hill. 4 & 5 Ph. & Mar. Bird

v. Bird.

12. Upon non concessit the plaintiff cannot give in evidence the statute of misrecitals or nonrecitals to make the King's grant good, but he should have pleaded the same. D. 129. pl. b. 65. Pasch.

2 P. & M. Heydon v. Ibgrave.

13. Trespass, the defendant pleaded not guilty; the jury found that the plaintiff was seised with two others as heirs in gavelkind, and that the defendant entered; and upon motion, without argument by Popham and Fenner (cæteris absentibus) it was adjudged for the plaintiff; for though it had been a good plea in abatement for the defendant to say, that the plaintiff was tenant in common with a stranger, yet forasmuch as he hath not pleaded it, he has lost the advantage thereof, and the finding it by the jury is not material. The defendant ought to have pleaded the jointenancy in bar; for it is the close of one only as to a stranger; Vol. XII.

and so it seems of tenants in common. Mo. 466. pl. 660. Paschi 39 Eliz. Stowell's Case.—And so it was said to be adjudged in this Court in one Stowell's Case; where in trespass brought the defendant pleaded not guilty, and the jury sound that the plaintiff was jointenant of the land with a stranger not named; yet there the plaintiff recovered, wherefore it was adjudged ut supra for the plaintiff. Cro. E. 554. pl. 7. Pasch. 39 Eliz. B. R. Deering v. Moor.

3 Le. 211. pl. 276. S. P. by Periam J.

if it were pleaded in bar; per Periam J. 2 Le. 37. pl. 48. Hill. 31 Eliz. C. B. in Case of Johnson v. Bellamy.

15. So of fines. 2 Le. 37. pl. 48. Hill. 31 Eliz. C. B. Johnson

v. Bellamy.

Ld. Raym.

16. Where a proviso in a deed goes by way of defeazance it must be pleaded by him who would take advantage of it; contra, where it alwards the proviso alters the fense of the covenant, by explaining or tying up the meaning to near a particular time, which would not have been understood on a general covenant, by which means it becomes part of the covenant.

2 Salk. 573. Hill. 10 W. 3. B. R. Clayton against Kinaston.

to another notice than the general words of the covenant would require, it need not be pleaded, be-

caufe it is part of the covenant itself.

17. In debt for rent on a lease for years, the issue was, whether the rent was paid or not; the defendant gave in evidence for part of the rent, that the plaintiff by covenant was to repair the house, and did not, and therefore he expended part of the rent in repairing the same. Gawdy said, it maintains the issue, for the law giveth this liberty to the lessee to expend the rent in reparations, to which Clench seemed to agree; but then he should have pleaded it, and not give it in evidence on the general issue. Contra per Fenner, for if the lessor will not repair, the lessee can only resort to his action of covenant. Cro. Eliz. 222. pl. 1. Pasch. 33 Eliz. B. R. Fenner v. Dorrington.

18. And as to the refidue of the rent, he gave in evidence payment to perfons who had rent-charges out of the land by the leffor's command, and held good evidence; for payment to another by the plaintiff's appointments is payment to himself. Cro. Eliza

222. pl. 1. Pafch. 33 Eliz. B. R. Fenner v. Dorrington.

19: In an action of debt brought against the defendant as administrator, he pleads divers judgments amounting to 670 l. and the assignment of 100 l. debt to the King by deed enrolled, and he pleaded that he retained his debt in his hand; and he might have given this in evidence, or pleaded it at the liberty of the desendant. I Brownl. 75. pl. 1. 44 Eliz. Bond v. Green.

20. Waste was assigned in boscis, viz. in succidendo, & vendendo decem quercos, &c. whereas the defendant had only lopped and shred the oaks. It seems, that as the waste is assigned he may safely plead nul waste done, and give the special matter in evidence. D. 92. pl. 16. Mich. 1 Mar. Anon.

21. Waste was assigned in fodiendo fossam in quodam prato.

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[ 71' ]
Godb. 216.
pl. 310. S.
C. accordingly.

The defendant pleaded no waste done. It was found by special verdiet that the defendant made the trench to drain the water, per quod pratum melioratur, & non pejoratur. It was objected, that this ought to have been pleaded, but by the opinion of the Court this is no waste [and so it seems it might be given in evidence].

D. 361. b. pl. 12. Pasch. 20 Eliz. Anon.

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22. Note that upon evidence given to a jury, upon the diffolution of a vicarage in the county of Warwick, which was part of the priory of Dantry, where the Pope by his bull gave to the vicar minutas decimas & alteragium; and it was certified by the doctors, that alteragium will pass to the vicar tyth-wool, &c. and the usage was shewed in evidence, and the copy of the Pope's bull; and the Court would not credit that without seeing the bull itself, and so the plaintiff was nonfuit, and the jury was discharged. Winch. 70. Hill. 21 Jac. C. B. Bret v. Ward.

23. It is not a general rule, that a matter could not be pleaded specially, which might have been given in evidence upon the general issue; as in an action of debt for rent, upon nil debet pleaded, an entry and suspension of the rent may be given in evidence; but yet that is always allowed to be pleaded, though it might be thewn upon the general issue. 2 Vent. 295. per totam Curiam.

Mich. 1 W. and M. cites Hob. 127.

24. I Jac. 1. 15. If any action be brought against the commissioners of a bankrupt, or any person authorized by them, they may plead not guilty, or justify by virtue of this or the former act of 13 El. 7. and the whole matter shall be produced in evidence, and if

verdict pass for the defendant, he shall have his costs.

25. 7 Fac. 1. 5. If any action, bill, plaint, or fuit upon the cafe, trespass, battery, or false imprisonment, be brought in any of the Courts at Westminster, or elsewhere, against any justice of peace, mayor, or bailiff of a town corporate, headborough, port-reeve, con-Stable, tithingman, collector of Subsidy or fifteenths, for any matter or thing done by reason of his office, every such justice of peace and officer aforefaid, and all others who in their aid and affiftance, or by their command, shall do any thing concerning their respective offices, may plead the general iffue not guilty, and give fuch special matter in evidence, as if pleaded had been good in law to have discharged the defendant, and if the plaintiff be nonfuit, &c. Shall have double costs. This statute made perpetual and extended to church-wardens and overseers, by 21 Fac. 12.

26. C. brought an action upon the case against one Wood, and counted that he was seised of a house and 20 acres of land, &c. in Thursfield; and that he, and all whose estate he hath, have had a common in 7 acres in T. and that he, all, and those, &c. have had one way leading through the faid 7 acres, and from thence into one common way leading to B. and from thence to Blately, and that the defendant had ploughed and turned up the 7 acres, and estopped the way. The defendant pleaded not guilty; refolved that the [ trial was good, for not guilty, is properly a denial of trespass and disturbance; and though he ought to prove title to the way,

yet it is sufficient if he prove title to the way by and thro' the 7 acres upon evidence; and yet if the prescription had been traversed, then he ought to prove all the way. Hutt. 39, 40. Mich-

18 Jac. Clerk v. Wood.

27. In action of trespass, if it appears upon the evidence, that the plaintiff had nothing in the land but in common with a stranger, yet the jury ought to find with the plaintiff, and if the desendant would have advantage of the tenancy in common in the plaintiff, he ought to have pleaded it. Nichols Serjeant was very earnest to the contrary, and took a difference where the plaintiff and defendant are tenants in common, and where the plaintiff is tenant in common with a stranger; but he was over-ruled, the action was of trespass, quare clausum fregit, &c. Ruled by Walmsly, Warburton, and Foster J. absentibus Cook and Daniel. Godb. 172. pl. 237. Pasch. 8 Jac. C. B. Berry's Case.

28. In a writ of right, if the tenant join the mife upon the mere right, he cannot give in evidence a collateral warranty, for he has not any right by it, and therefore it ought to have been

pleaded. 1 Inft. 283. a.

29. Assumpte to pay money on the marriage of his daughter, the defendant on non assumptit gave in evidence a discharge of the contract; but Hale Ch. J. before whom the cause was tried at Guildhall, said he ought to have pleaded exoneravit; but that this mitigates the damages. 2 Lev. 81. Hill. 24 and 25 Car. 2. Abbot v. Chapman.

30. In an action on trover of goods, the defendant pleaded fale in the market overt, whereby he justifies the conversion; and it was held to be no plea, because it amounts but to the general issue, and ruled accordingly, that if he did not plead, a nihil dicit should be entered. Cro. J. 165. pl. 3. Trin. 5 Jac. B. R.

Johns v. Williams.

31. Twas held that if colourable payment of money by a purchaser is recited when in truth none was paid, this estate is invalid against him that comes in bona side for a valuable consideration, and this may be given in evidence well enough without pleading it. Clayt. 32. pl. 55. Aug. 11 Car. Barkley J. Ballard v. Sitwell.

- 32. Avowry for damage done, &cc. and iffue joined upon the freebold, and the plaintiff did allege that the defendant had made a leafe before the caption, and holden no evidence, but he ought to have pleaded it, &c. and for this cause, the plaintiff was nonsuited, but the jury did enquire of the damages and costs by direction of the Court, and so is the practice in replevins. Clayt. 91. pl. 155. Mar. 16 Car. Whitsield Serjeant, Judge of Assis. Dickenson v. Malliverd.
- 33. It was faid by the whole Court, that a consideration is not traversable upon an assumpsit, but they ought to plead the general issue, and the consideration ought to be given in evidence. Hetl. 50. Mich. 3 Car. C. B. Wilkins v. Thomas.

34. Action fur case sur assumptio, the defendant pleads non as-

fumplit and upon evidence gave the statute of gaming in evidence, and allowed by Jefferies Ch. J. Otherwise it seems, if it had been debt upon a bond, &c. then it ought to be pleaded. Skin. 195. pl. 9. Trin. 36 Car. 2. B. R. Anon.

35. One jointenant or tenant in common, or parcener, cannot bring trover against another, and if he does, 'tis good evidence on the general issue of not guilty; but if one jointenant brings trover against a stranger, in that case the defendant may plead it in abatement, but cannot take advantage of it in evidence. T I Salk. 290. pl. 29. Trin. 7 Ann. B. R. Brown v. Hedges.

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36. In trespass quare clausum fregit, it is a plea in abatement to 7 Mod. fay, that the plaintiff is tenant in common with another, but it cannot 105. Mich. be given in evidence upon not guilty, as it may where one tenant in B. R. per common brings trefpass against the other. Vent. 214. Trin. Holt Ch. J. 24 Car. 2. B. R. Anon.

37. When an executor or administrator had done what they ought to do, they may plead plene administravit, and give the special matter in evidence; but when judgments are due, and bonds fued, they cannot give that in evidence, but must plead it, because the goods to fatisfy are in their own hands, and fo not properly administered, though liable to the judgment; per Vaughan, nemine contradicente. Freem. Rep. 150. pl. 171. Pafch. 1674. Anon,

38. Depositions taken coram non judice, are not allowed to be used at a trial at law. Chan. Cases, 306. Hill. 29 & 30 Car. 2. Stock v. Denew.

39. In affumpfit, exoneravit ought to be pleaded, but being given in evidence, it mitigated the damages. 2 Lev. 81. Hill. 24 & 25 Car. 2. B. R. per Hale Ch. J. Abbot v. Chapman.

40. If an action is brought upon a promife in law, payment before the action brought may be given in evidence, but where the action is grounded on a special promise, there payment, or any other legal discharge must be pleaded. Mod. 210. pl. 42. Hill. 27 & 28 Car. 2. C. B. Fits v. Freestone.

41. Upon a motion for a new trial, the case appeared to be, that the lord of a copy-hold manor ought to repair a common bridge, and the custom was, that he might take necessary timber for this purpose upon any of the copy-hold lands, the which he had done, and in trespass for it by a copy-holder, he would have given this matter in evidence upon non culp.; but it was not allowed, for he ought to have pleaded it as in Hob. 174, 175. trespass for felling trees, the defendant pleaded non culp. He cannot maintain this plea, except the trees were his actually before he felled, for if he had but a liberty to fell, he ought to have pleaded it, and not pleaded non culp. Skin. 321. pl. 2. Trin. 4 W. and M. in B. R. Anon.

42. An action on the case brought on assumpsit to secure goods from perils, those of the sea excepted; in this case it was held by the Court, that in affumpht in fact, on a non affumpht pleaded, a release cannot be given in evidence to take away the affumpfit,

v. Davis.

[ 74 J

affumplit, but only in mitigation of damages; but on affumplit in law, and a non affumplit pleaded it may, because it takes away the affumplit. Quære, says the Reporter, if in an affumplit, either in sact or law, on a non affumplit pleaded, performance can be given in evidence. Sid. 236. pl. 3. Hill. 16 & 17 Car. 2. B. R. Beckford v Clark.

43. In an assumpsit in consideration of the marriage of his daughter on non assumpsit pleaded, exoneravit cannot be given in evidence to discharge the promise, but only in mitigation of damages, but it ought to be pleaded. Cited per Hale. 2 Lev. 81.

Hill. 24 & 25 Car. 2. B R. Abbot v. Chapman.

44. Any thing in the same statute, upon which a suit is commenced, may be given in evidence, but if it be in another statute, it must be pleaded; but since the statute of 21 Jac. 1. upon the general issue, any thing may be given in evidence and excuse of the party; per Hale Ch. J. Hard. 231. pl. 6. Trin. 14 Car. 2. in Scacc. in Case of Hammond v. Taylor.

46. In trover on not guilty, the evidence was, that the goods were taken and fold by virtue of a commission of sewers, and held good. All. 92. Mich. 24 Car. B. R. Combs v. Cheney.

47. Custom of foreign attachment may be pleaded or given in evidence. 3 Keb. 221. Mich. 15 Car. 2. B. R. in Case of Bennet

v. Thorn.

48. The flatute of limitations may be given in evidence, as well as pleaded, as had been ruled by Ld. Ch. J. Hale; but agreed per Cur. that the best way is to plead it. Skin. 24. (bis) Mich.

33 Car. 2. C. B. Philpot v. Walcot.

49. Debt for rent against an assignee, and nil debet pleaded; upon which they were at issue, and the defendants gave in evidence an assignment of the term before the rent incurred; it was objected, that this was a fraudulent assignment, and so void; and of this opinion upon the trial was North Ch. J. but after, the case being in Court upon many debates, and much litigation of the matter, it was ruled that it might be given in evidence as it was cited by Pemberton. Pasch. 4 Will. & Mar. in B. R. and not denied per Cur. to have been adjudged betwixt Christy and Wilcox. Skin. 318. Christy v. Wilcox.

But by the 50. Regularly, what soever is done by force of a warrant or autho-

H. 8. c. 5. rity, ought to be pleaded. Tr. per Pais, 3d edit. 377.

done by the authority of the commission of sewers may be given in evidence on the general issue. Tr. per Pais, 3d edic. 377.

51. In trespass against one for gleaning on his ground; per Hale, Norfolk summer assise 1668. The law gives licence to the poor to glean, &c. by the general custom of England, but the licence must be pleaded specially, and cannot be given in evidence on non culp. cites Tr. per Pais, 202.

52. In all cases where one cannot have advantage of the special matter by way of plea, there he may have advantage of it in evidence;

as for example, the rule of law is, that one cannot justify the death or killing of a man, and therefore if one kills another in his own defence, he cannot plead this specially, but he may give this in evidence; fo in defence of his house against thieves and rob-

bers, &c. Try, per Pais, 3d edit. 377.

53. The defendant was a vintner in Beverley, and the plaintiff fued him for 51. for felling wine for not being licenced according to the statute of E. 6. by the justice of peace there being a corporation, and shewed the defendant did inhabit there; and jury found for the plaintiff to the value of one pint of wine fold by the defendant, and to prove the defendant guilty, it was proved that the daughter of the defendant brought in the wine, and did rewive the money for it; and this was held good evidence that the defendant himself sold the wine, without proof that the money came to his hand, or that it was his wine, &c. Clayt. 150. pl. 275. August 1650. before Baron Thorpe Judge of Nisi Prius. Smalls v. Davie.

54. Affumplit against a feme who pleads coverture tempore promissionum, plaintist demurs, because it amounted to the general issue. Per Cur. where it is matter of law that amounts to the general iffue, it may be pleaded, and is no cause of demurrer; for matter of law in that case is matter of fact, which avoids the action, and so may be pleaded or given in evidence as defendant pleafes. 12 Mod. 101. Mich. 8 W. 3. James v. Fowks.

55. It is no general rule that a matter cannot be pleaded fpe- Per Holt C. eially, which might be given in evidence upon the general issue. J. S. P. 1:
Mod. 376. 2 Vent. 295. Mich. 1 W. & M. Sarsfield v. Witherly.

Paramar v.

56. As in debt for rent an entry and suspension of the rent may [ 75 ] be given in evidence upon nil debet, yet it is always allowed to be pleaded, and fo nil habint in tenementis. 2 Vent. 295. ibid.

57. And wherever the matter pleaded contains matter of law it is allowed to be pleaded, though it might be shewed upon the

general issue. 2 Vent. 295. cites Hob. 127.

58. At Guildhall an action upon the case was brought for money received to the use of the plaintisf, the defendant would have given in evidence upon non affumpfit, that the money was condemned upon a common attachment within the city of London, the which was opposed, because the condemnation was after the action commenced in the Courts above; to which it was answered, that though it was after the action commenced, yet it was before non affumplit pleaded, and fo well enough, non allocatur; for the difference is, where the condemnation is before the action commenced, there the defendant may plead non affumpfit, and give the attachment in evidence; but where the condemnation is after the action commenced, the defendant ought to plead it. Skin. 639. pl. 3. Pasch. 8 W. 3. B. R. Briat v. Gyll.

59. If action be brought against administrator by the name of exeouter, he cannot plead in bar ne unques executor, and give in evi-

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dence he was administrator, because he allows himself to be

fuable. 12 Mod. 45. Mich. 5 W. and M. Anon.

60. A tenant in tail had acknowledged a judgment or recognizance and died; upon a feire facias against his heir and tertenant the sheriff returned a sei. seci, and there was judgment by default. In ejectment it was ruled, that the issue in tail could not give in evidence, that the conusor was only tenant in tail, because he might have pleaded it to the seire facias; a case cited by Holt Ch. J. Comb. 446. Trin. 9 W. 3. in Case of Lambert v. Cameret.

61. Action in name of CAMERET v. LAMBERT, verdict and judic. pro quer. writ of error coram vobis; error in fact assigned that C. before the trial, &c. died; L. says, that he was alive, et ad tunc in plena vita existit et hoc petit quod inquiratur per patriam, per Holt Ch. J. You are estopped in evidence to show that plaintiff died before the original action; for by the plea you admitted him to be alive; but here desendant in error by his pleading seems to have set plaintist loose from his estoppel, whereas if he had said absque hoc that he had died before the action brought and the trial, he had hampered him; and the evidence was admitted, and left to the jury. Comb. 446. at the Sitting at Nisi Prius at Guildhall, June 1697. Lambert v. Cameret.

62. In debt for rent, and nil debet pleaded, the statute of limitations may be given in evidence, for the statute has made it no debt at the time of the plea pleaded, the words of which are in the present tense. Aliter, in an action fur assumpting for the plea of non assumpting relates to the time of making the promise. I Salk. 278. pl. 1. coram Holt Ch. J. at Niss Prius at Hereford, 1690. Anon,

63. If an act of parliament makes writing necessary to a common law matter where it was not necessary by the common law, you need not plead the thing to be in writing, but give it in evidence; but where a thing is originally made up by act of parliament, and required to be in writing, you must plead it with all the circumstances required by the act, as upon the statute H. 8. of wills, you must plead a will to be in writing; but a collateral promise, which is required to be in writing by the statute of frauds, you need not plead to be in writing, though you must prove it so in evidence; per Holt Ch. J. 2 Salk. 519. pl. 17. Trin. 13 W. 3. Anon.

64. 43 El. 2. 1. 19. If any person shall be prosecuted for what he shall do in pursuance of this act for the relief of the poor, he may plead the general issue, and give the special matter in evidence, and in case the plaintist be nonsuit, &c. the defendant shall recover treble damages, with costs.

65. So in battery or maybem for breaking a limb, &c. the loss of time may be given in evidence upon the common declaration. Carth. 296. Hill. 5 W. & M. B. R. in Case of Child v. Sands.

66. After condemnation on a feizure, the rule is, (viz.) if the action is trover, the condemnation may be given in evidence upon the general issue, because thereby the property is divested out of

the party; but if the action is trespass, then the matter may be specially pleaded; per Ward Ch. B. Carth. 327. Trin. 6 W. & M. in Scac. in Case of Martin v. Wilsford.

67. In trover defendant cannot give a release in evidence, but he ought to have pleaded it. Comb. 473. Pafch. 10 W. 3. B. R.

Kingston v. Read, at Guildhall.

68. Where a proviso goes by way of defeasance of a covenant, it must be pleaded on the other side; otherwise where by way of explanation or restitution of the covenant; per Holt. 2 Salk. 574. Trin. 10 W. 3. Clayton v. Kinaston.

69. Diverfity was faid to be where the fact is complicated, and may be apt to inveigle the jury; in such case, that the Court may be the better able to direct the jury, the special matter may be

pleaded. Arg. 12. Mod. 538. Trin. 13 W. 3.

70. Consequential damages may be given in evidence in an action Carth. 294. on the statutes against sueing in the admiralty, though not mentioned S. C. acin the declaration, as, that he lost the profits of his voyage; but if Comb. 217. it be laid specially in the declaration, (viz.) per quod, he lost the pro- Sands v. fits, &c. it is but furplufage. Carth. 296. Hill. 5 W. & M. in Child, S. C. B. R. in Cafe of Child v. Sands.

and judgment at-

71. In an action on the case for fees, &c. the defendant pleaded the statute of 1 Fac. that no bill was delivered under his hand; per Cur. this statute may be given in evidence on the general issue non assumpsit. Cites Show. 338. Mich. 3 W. & M. Milner an Attorney v. Crowdall.

72. Upon all general issues, you may give special matter in evi- Id. Raym. dence. If you give colour, you may plead it specially; as in debt Rep. 566. for rent, you may plead nil debet, and give release in evidence; per S. P. Holt. 12 Mod. 377. Pasch. 12 W. 3. in Case of Paramour v. Johnson.

73. When you have a good matter in bar, and an opportunity to plead it, you shall not give it in evidence; per Holt Ch. J. 12 Mod. 412. Trin. 12 W. 3. in Cafe of Rook v. Sheriff of Salifbury.

74. Trespass for entering the plaintiff's house, and keeping the posselsion thereof for so long; defendant pleads, that J. S. was seifed in fee thereof, and he being so seised, gave licence to the defendant to enter into, and possess the said house, till he gave him notice to leave it; that thereupon he entered, and kept the house for time mentioned in the declaration, and had not any notice to leave it all the time; and a special demurrer because the plea amounted to the general issue; and per Cur. he might have given this matter in evidence against all people, except J. S. but against him he must have pleaded it. So he should here either have pleaded the general iffue, or given colour to the plaintiff; ergo jud. pro quer. 12 Mod. 513, 514. Pasch. 13 W. 3. - v. Saunders.

75. 8 & 9 W. 3. cap. 26. feet. 6. No retaking shall be given in evidence in an action of escape, unless specially pleaded, and oath be made by the keeper of the prison that such escape was without his

confent; but if such affidavit prove falle, such keeper shall forfeit

76. If a man be indicted for murder or felony, he may plead not guilty, and give a pardon in evidence; but if he have occasion to plead a pardon in bar of any collateral matter, there he shall not plead to iffue, and give the pardon in evidence; as if a scire facias were brought upon a recognizance, there you must plead the pardon; per Holt Ch. J. 12 Mod. 613. Hill. 13 W. 3. in Case of Ingram v. Foot.

77. Case on bill of exchange pleaded, that defendant after acceptance gave a bond in discharge of it, and on demurrer it was objected, that it amounted to the general issues; for the debt upon the bill being extinguished by the bond, the defendant ought to have pleaded non assumpfit, and to have given the bond in evidence, and the Court feemed to be of that opinion, but by confent, the defendant pleaded the general iffue. 5 Mod. 314. Mich. 8 W. 3. Hackshaw v. Clerke.

Ld. Raym. 78. In all causes where a man admits the action, were it not for Rep. 88, 10. In all causes where a man admits the action, were it not for 29. Huffey Special matter, that matter may be specially pleaded; though it v. Jacob. may likewise be given in evidence on the general issue. 12 Mod. S. C. & S. 97. Trin. 8 W. 3. Hussey v. Jacob.

P. - I Salk.

344. pl. 2. S. C. & S. P. but otherwise, where the matter of the plea does not aver, but deny .--

79. It is not a rule, that because a matter may be given in evidence, that therefore it must not be pleaded specially; for it often happerts to be in election of defendant, either to plead it specially or not, as he shall be advised; per Cur. Carth. 357. Trin. 7 W. 3. B. R. Hussey v. Jacob.

80. Where the matter of the plea confesses the cause of action, but avoids, the defendant may plead specially, though he might have given it in evidence; otherwise where the matter of the plea does not avoid but deny. 1 Salk. 344. pl. 2. per Curiam, Mich.

8 W. 3. B. R. in Case of Hussey v. Jacob.

81. In an action upon the case of a bill of exchange, defendant Courtat last pleaded that he was at Paris, as a traveller, &c. and there drew upon con- the bill, &c. but that he was never a merchant; it was held, that this being matter of law it might well be pleaded, though objected it amounted to the general issue; and if the matter encies which would avail the defendant, he might give it in evidence on non might enfue affumpfit. 2 Vent. 295. Mich, I W. and M. Sarsfield v. Wiamongst fo-reign mer- therly.

chants upon bills of exchange, if persons who took on themselves to draw such bills, should not be liable to the ayment thereof, they all agreed that the judgment should be reversed. - Comb. 152. S. C. and per Pollexfen Ch. J. it may be either pleaded specially or given in evidence; and that, to avoid the involving a great deal of matter in the iffue, and that it is a merchandizable act, and hinders him from pleading that he is no merchant, and the custom is laid for merchants and other persons negotiators; and the judgment was reverfed, for that he is a merchant by the taking up of money and drawing the bill-Show, 125. S. C. in error, in Cam. Scace. and judgment for the plaintiff.

> 82. At a trial at Hertford summer assises 10 W. 3. in case for Ropping

Carth. 82.

fideration had of the inconvenihopping the plaintiff's lights the defendant pleaded not guilty; and gave in evidence that the corporation of Hertford were lords of the foil, where, &c. and prescribed to set up stalls there, being near the market-place. And it was admitted by Holt Ch. J. to be given in evidence upon the general issue, because this is to claim property in the foil, but where the defendant, or he under whom he claims, claim only a particular benefit, as common or easement, as a way, and not the property in the foil; he ought to plead it specially, and cannot give it in evidence upon the general iffue pleaded. Ld. Raym Rep. 732. 10 W. 3. Kent v. Wright.

83. Where there is a special matter to avoid the plaintiff's action [ 78 ] which the defendant cannot give in evidence upon the general iffue, he may in fuch case plead it specially; but he needs not where he can give it in evidence on the general issue; adjudged. 3 Salk.

155. pl. : 1. Mich. 12 W. 3. Anon.

84. So where there is a meer matter of fact to avoid the plaintiff's action, the defendant may plead the general iffue, and give it in evidence; but if the matter of fact contains likewife matter of law, the defendant may either plead specially or generally, and give the special matter in evidence. 3 Salk. 155. pl. 12. 12 W. 3.

85. It was ruled by Holt Ch. J. upon evidence at a trial at nift prius at Norwich, summer assises, 12 W. 3. that if, in indebitatus affumpfit for goods fold and delivered, upon non affumpfit pleaded, the defendant gives in evidence, that the debt was attached by foreign attachment in London upon a plaint levied by J.S. ( to whom the plaintiff was indebted) against the plaintiff, &c. the defendant will be driven to prove that the plaintiff was indebted to J. S. because the plaintiff has no notice of the foreign attachment; and therefore it may be only a contrivance by the defendant and J.S. to bar the plaintiff of his present action. 2dly, In such case the plaintiff may shew in evidence, that the fuit in London was after an original filed by the plaintiff in some one of the superiour Courts; and that will avoid the operation of the foreign attachment. 3dly, If the original did not iffue before the plaint was entered in London, but only was antedated, and bore teste before, and no arrest was made before upon it; that will not avoid the foreign attachment; but this latter point Holt referved for his farther confideration; but (ut audivi) he was afterwards of the fame opinion. Ld. Raym. Rep. 727. Palmer v. Hooke or Gouche.

86. In tresposs-for goods, the defendant confesses the taking, but fays he bought them in market-overt, per Holt. 12 Mod. 377. 12 W. 3. In Case of Paramour v. Johnson, cites 10 Co. By-

field's Cafe.

87. But it is indulgence to give accord with fatisfaction in evi- Ld. Raym. dence upon non assumptive pleaded; but that has crept in and now Rep. 566, is settled. Per Holt. 12 Mod. 377. Pasch. 12 W. 3. In Case of P. by Holt Paramour v. Johnson.

88. Debt for rent upon demise; as to part, nil debet, as to the other part, nil babuit in tenomentis, &c. but beld ill; for in con-Aruction

struction of law nil habuit, &c. goes to the whole, and having also pleaded nil debet, that makes the plea double; for on nil debet, nil habuit, &c. might have been given in evidence, but by pleading nil debet, the demife was admitted; and then by faying mil habuit, &c. it is repugnant; but he should have traversed the whole demife. 4 Mod. 254. Hill. 5 W. and M. in B. R. Combs v. Talbot.

89. As the pleading a release, coverture or infancy, in an assumpfit, and yet those things might be given in evidence upon non affumpfit pleaded; however the defendant fometimes may not be willing to put fuch matter of law to the judgment of the jury, or perhaps may defign to fave the costs of a special verdict. Carth. 357. per Cur. Trin. 7 W. 3. B. R. in Case of Hussey v. Jacob.

90. Feme covert may plead non affumpfit and give coverture in evidence, because coverture makes it no promise; the same of non est factum to a bond. 6 Mod. 230. Mich. 3 Ann. B. R.

Anon.

In an action of trefpafs, quare claufum fregit, the defenand at the

91. In trespass, quare clausum fregit, not guilty was pleaded, and on trial the defendant gave evidence that it was in a highway; and per Cur. 'tis a special justification, and ought not to be allowed to be given in evidence on the general iffue. 1 Salk. 287. dantpleaded Mich. 5 Ann. B. R. Watfon v. Sparks.

trial before Mr. Baron Carter at the affizes for Devonshire, offered to prove that the place was a common highway; but the judge not allowing him to go into the evidence, the plaintiff obtained a rewrited; upon this the defendant moved for a new trial, and the fingle question was, whether upon this iffue the defendant can give in evidence a highway? And it was admitted by all to have been a vexata questio, in which there had been great variety of opinions; for the plaintiff it was infifted, that all matters of justification must be pleaded, and not given in evidence, and that the contrary would be a great surprise upon the plaintiff, who comes only to prove the trespass, and not to controvert whether the place be a highway or not; and the case in Salk. 287. was relied upon; for the defendant it was faid, that in many cases the party may either plead the special matter, or give it in evidence; that nothing is more special than the custom of foreign attachment, which yet is received in evidence upon non assumptit; so in ejectment almost any thing is given in evidence; that feveral statutes have enabled defendants to plead the general issue, as those of the 7th and 21 Jac. 1. That perhaps a private way (being a private right, and as it were a profit apprender in alieno folo) must be pleaded, but that it is otherwise of a publick highway, being the concern of the publick, for whom the King is a truftee; and that it could be no furprife, fince nothing can be more notorious than a highway, and the plaintiff cannot but know his own case; but all the Court were clear of opinion for the plaintiff; that the old rules of special pleading are not to be departed from, which would create great confusion and inconvenience; that they were founded in great wisdom and experience, and that if ever any persons have disliked or thought meanly of them, the least that can be faid of such person is, that they understood nothing of them. That wherever a defendant admits the fact charged, but infifts either upon a general or special reason in justification or excuse, he must plead it specially. That where any acts of parliament allow the contrary, the Court is not to contravert them; but as they extend only to particular cases they are out of the question. That as to ejectments, it is true, any title may be fet up in evidence; and though it has proved very inconvenient, yet the law being so settled, it is too late to complain. However, 'tis not so had in that case, because the party may bring a new ejectment. That the only pretence for allowing a highway in evidence is, that it is the foil of the Crown, and the King ('tis faid) has the free-hold in truft for all the subjects of England; whereas it is notorious that the freehold belongs to the tord of the foil through which the highway runs; who, in confequence of his ownership, has a right to all the profits, as the trees, grass, &c. And lastly, They held, that the admitting such evidence must be a great surprise upon the plaintiff, who having enjoyed the land as his freehold, has no reason to suppose it is a highway, or that defendant will infift upon it as such. Accordingly the Court were clear of opinion forrejecting the evidence, but would make no rule till they had confulted with the rest of the judges; and the last day of the term the Ch. Justice reported, that at his request the Ld. Ch. Justice of the King's Bench had put the question to all the judges, by whom it was fully debated,

and that a great majority of them were of opinion, that upon a plea of not guilty to an action of trefpass quare clausum fregit, the desendant cannot give in evidence, that the place where, &c. is a highway; upon which the rule for a new trial was discharged. Trin. 14 Geo. 2. C. B. Selman v. Courtney.

92. The plaintiff brought trover as administrator, and declared 7 Mod. 141. upon the possession of the intestate, and upon not guilty pleaded at P. by Holt the trial, the counsel for the defendant offered to give in evidence, Ch. J. that the pretended intestate made a will and an executor; but Holt Ch. J. overruled it, and took this diversity, that where an administrator brings trover upon his own possession, the defendant may give in evidence a will, and an executor upon not guilty; otherwise if it be on the possession of the intestate, (as in the principal case) for there the defendant ought to plead it in abatement, and if he does not, he shall not give it in evidence. 1 Salk. 285. Mich. 1 Ann. Blainfield v. March.

93. Where a general jurisdiction is given by statute, and a proviso excepts particular persons or things, all those may be given in evidence; for if the party or thing is not within the act, the person accused is not guilty; but where the jurisdiction is limited and confined to particular persons or things with a proviso of execution, this must be pleaded, and you must shew how the person or thing is within the act. Mich. 11 Ann. B. R. Reg. v. Ridley, on the

Fire Act.

94. If an administrator bring trover upon the possession of the intestate, and not guilty is pleaded, then the defendant cannot give in evidence a will made and executors appointed, but that ought to have been pleaded in abatement. 7 Mod. 141. Hill. 1 Ann. in B. R. 13. Blainfield v. March.

95. But if trover had been on the possession of the administrator, there upon not guilty he might take advantage of that matter in evidence. 7 Mod. 141. Hill. 1 Ann. in B. R. 13. Blainfield v.

March.

96. On not guilty pleaded in trespass it was given in evidence, [ 80 ] that the place was an highway. The case was, the plaintiff had At Croydon altered the common highway, and fet out another over his field, as Prat Ch. J. more commodious for him, and it was further given in evidence pro anno 1720. quer. that the defendant had opened a gate fet up on his new way he faid, that per quer. and held, that he might justify the pulling of it down in trespass on not guilty pleaded; per Baron Price at Sarum. Trin. Vac. not give in 1711.

that it was

an highway, but that Powel, Price J. of an opinion it might be done; but that all other judges that he ever knew, were of a contrary opinion. - Show. 271. 291. -

97. Whatever is a discharge of the action may be given in evidence on non affumplit, so a release or discharge by a second agreement will be good evidence on non assumpsit without pleading it; for as a promise is made by parol, so it may be discharged by parol; per Pratt; but Eyre and Fortescue J. e contra, and that it ought to be pleaded. Pasch. 7 Geo. B. R. Allen v. Jacob.

98. Where any thing goes in denial of the fact, there it must be given

given in evidence on the general issue, because whatever denies that cause of complaint is matter proper to be exhibited to the jury, who are judges whether the fact was so or not; and therefore actions of trover and assumptit, which are modern inventions to get rid of law-wagers, which lay in the ancient actions of debt and detinue were so formed, that almost every thing may be given in evidence on the general issue. Gilb. Hist. & Pract. of C. B. 52.

99. Thus in trover, the plaintiff declares on the property of goods and chattles, and that they came to the defendant by finding, whatever matters were alledged that confess property in the plaintiff will intitle him to his damages, and whatever denied it is on the general issue; and therefore levying by distress, releases, and the like, which were anciently pleaded in this action, are not given in evidence, because they disaffirm the property of the plaintiff on which his

action is founded. Gilb. Hift. &c. of C. B. 52, 53.

100. So in affumpfit, the action is formed on a contract, and the trespals to the plaintiff in the non performance of it, and the issue is non assumpsit, instead of the old issue, which was not guilty, as non dimifit was on an action of debt on a leafe, and non detinet on the detaining of goods, yet on the iffue, every thing may be given on evidence which disaffirms the contract, for that goes to the gift of the action, fince there is no contract to be performed at the commencement of the action, there could be no trespass for the nonperformance of it, and therefore a release goes to the gift of this action; for it shewsthere was no contract at the time the action was commenced; for as in trover he must have a right to the thing declared on; therefore every thing which shews the contract to be void, as nonage, or more money loft at play than the statute allows, may be given in evidence on the general iffue; for on a void contract, the plaintiff has no right to any, therefore this and the like goes to the gift of the action. Gilb. Hift. &c. of C. B. 53.

101. In a declaration about a feat, you need not alledge the repairing, but must prove it upon the trial; coram Baron Cummins,

at Taunton assises. Hill. Vac. 1727-28.

## What Things may be given in Evidence. And of what.

#### [A. b.] Act of Courts:

Keb. 16. 1. THE act or order of Ecclefiastical Court for granting letters of administration proved by the book is good evidence. Lev. ter, S. C. 25. Pasch. 13 Car. 2. B. R. Garret v. Lister.

pl. 78. Persley v. Friend, S. P .- 1 Lev. 101. Peaselie's Case, Pasch. 15 Car. 2. B. R. S. P .-

2. Copy of the inrollment of the grant of office of clerk of the papers in B. R. allowed to be good evidence. Vent. 296. Trin. 28

Car. 2. B. R. Woodward v. Afton.

3. Two commoners in behalf of themselves, and all the commoners within H. preferred a bill in the Dutchy Court against the owner of the land, in which they claimed common, &c. and upon hearing the cause, the common was decreed for them. The Dutchy Court was put down, and the now defendant having purchased land within H. the plaintiff, who was a commoner when the decree was made, but not a plaintiff in that cause, exhibited his bill against the now defendant to have the use of the depositions taken in the cause in the Dutchy Court at a trial to be had at the affifes, and the defendant demurred to the bill, and allowed, because neither the plaintiff nor the defendant were parties to the former cause, though the fuit there was the same cause upon which the action of law was now brought, and of general concernment; and it feemed hard, confidering that the defendant here claimed under the defendant there. Hardr. 22. Mich. 1655. in Scace. Stanley v. Pegg.

[A. b. 1] Acts of Parliament.

I. In an action the defendant pleaded the composition act; the plaintiff replied nul tiel record, and upon the day given to the defendant to bring in the record, he produced the printed statute; per Holt Ch. J. an act printed by the King's printer is always allowed good evidence of the act to a jury, but was never yet allowed to be a record without an exemplification under the great seal, and it must be pleaded as exemplified. 2 Salk, 566. Trin. W. 3. B. R. Anon.

2. A private all printed among the publick alls, hath been al-

lowed in evidence; per King Chanc. Trin. Vac. 1727.

3. Even a private act of parliament in print that concerns a whole county, as the act of Bedford-Levels, may be given in evidence without comparing it with the record; per Holt Ch. J. 12 Mod. 216. Mich. 10 W. 3. at Guildhall, in Case of Dupais v. Shepherd.

4. A copy of an act of parliament is no evidence unless the act had been before allowed of, and so made a record of this Court, for otherwise nothing shall be allowed of as a sufficient evidence of the act but the exemplification of it under the great seal, and the reason is, because the Court is a party, which cannot pray eyer as the party may; so that the Court would be in a worse condition than a common person, if they were to receive for evidence a copy offered them. 10 Mod. 126. in Case of the University of Cambridge, cites 35 H. 6. 14. and this was allowed to be so per Curiam.

5. Antient usages for 3 or 400 years is good evidence of a law. If an act of parliament be lost, or embezzled, the law remains still. 12 Mod. 181. Hill. 9 W. 3. King v. Hewson.

6. A printed copy of a private act of parliament, or ordinance obfolete, was disallowed by all the Court to be given in evidence, unless less it had been examined by the original. Keb. 2. pl. 4. Pasch. 13 Car. 2. B. R. Anon.

As by ancienteopies, transcripts, books, any circumstances and proofs they may be manifested, they have pleadings, and memo
7. Though acts of parliament, and the inrollments of them circumstances of them are destroyed by fire, or rebellion, or by the injury of time, yet if by any circumstances and proofs they may be manifested, they have the force of acts of parliament. Jenk. 280. pl. 5.

rials, but the Court must not admit the same to be put in issue by a plea of nul tiel record. Hale's Hist. of the Law, 15, 16.

8. Act of parliament produced in evidence for felling delinquents estates was fworn to be examined by the parliament-roll, and that it was a true copy, before it was admitted to be read in evidence. Sti. 462. Mich. 1655. in Case of Thurle v. Madison.

The printed 9. Printed statute is not evidence on nul tiel record; but must be exemplified under the great seal; per Holt Ch. J. 2 Salk. 566. dence of ge- pl. 5. Trin. 11 W. 3. B. R. Anon.

tutes, but not of private ones. Tr. per Pais, 232.

ro. The copy of a private act of parliament may be given in evidence; and if upon collateral iffue it is to be proved that such a one was justice of the peace or baronet, &c. common reputation is sufficient proof, without shewing the commission or letters patent of the creation. L. E. 89. pl. 12. cites Tr. per Pais, 226. 3 Jac. 2.

11. A printed copy of an act of parliament is not to be given in evidence, if not examined by the rolls, and fworn to be a true copy.

L. E. 89. pl. 13. cites Tr. per Pais, 232. 3 Jac. 2.

12. A private act that concerned Rochester bridge, though printed by Rastal, was not allowed in evidence, not being examined by the record. Otherwise of general statutes; there the printed statute-book is good evidence. L. E. 89. pl. 14. cites Tr. per Pais, 232.

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#### [A.b. 2] Admission.

1. Finding by special verdict or admission on former pleading is good evidence, unless the contrary appear. 1 Keb. 720. pl. 50.

Pafch. 16 Car. 2. B. R. in Cafe of Lee v. Boothby.

2. At Guildhall in an action for work done, &c. the plaintiff gave in evidence to charge the defendant a copy of a bill delivered to the defendant, and copied by the order of the defendant, and diverse exceptions were taken by the defendant to the bill, scil. First to the quantity of the work done, and the others were marks against diverse parcels; scil. O. and N. intending by it that these parcels were wrought for others, and not for the desendant, and other exceptions there were to the price, and he ordered the servant to indorse upon the backside the exceptions to the quantity and price, but to omit the marks O. and N. and it was ruled by Holt Ch. J. upon evidence, First, That this copy of a bill delivered was evidence, as a copy of a bill and not a copy of a copy, and the bill is

and original as well as the book. 2dly, That the acceptance of a bill delivered without objection but to some particulars, is an admittance of the residue to be true. 3dly, That the ordering a copy of the bill indorsed ut supra, omitting the marks O. and N. and this copy with the exceptions being ordered to be delivered to the plaintist, it is a waving of the exceptions signified by those marks. 4thly, Though it was objected that this evidence is a confession, and therefore it ought to be taken together; yet per Holt Ch. J. they are not part of a confession (which ought to be of the same thing) but a cavil or objection as to the price or quantity, [83] &c. Skin. 672. pl. 11. Mich. 8 W. 3. B. R. Worral v. Holder.

3. In debt upon a bond, defendant pleaded that he became a bank-rupt, that a commission was taken, &c. and that bond was given to induce plaintist to sign the certificate; and so void, &c. Issue on this, and at the trial coram Powys at Guildhall in absentia Ch. J. defendant was held to prove the whole matter, and he being not able to do it, there was a verdict pro quer. but on a motion for a new trial, this verdict was ordered to stand as a security, and a new trial was granted, because what they were called upon to prove was admitted by the issue, which was only whether the bond was given ca intentione to induce the plaintist to sign the certificate. Mich. 6 Geo. B. R. Chace v. Lewis.

## [A. b. 3] Affidavit.

1. A man being about to convey lands to a purchasor made oath before a Master in Chancery, that there was no incumbrance on the estate; in an ejectment brought, this assidavit was produced in Court, but not suffered to be read but as a note or letter, unless the plaintist would produce a witness to swear that he was present when the oath was taken before the Master. 3 Mod. 36. Mich. 35 Car. 2. B. R. Smith v. Goodier.

2. The plaintiff or the defendant may make an affidavit in their own cause depending here, and it may be filed, but it may not be admitted in evidence in the trial of the cause betwixt them. L. P. R. 552. cites Mich. 1656.

3. Though an affidavit cannot be read in evidence, yet if the party who made the affidavit be fworn, and gives evidence, his own affidavit may be read against him; and this is allowable to shew in what he contradicts himself. Skin. 403. pl. 39. Mich. 5 W. and M. in B. R. the King and Queen v. Rachel Taylor.

4. On question on a trial, whether the property of a parcel of wine was in the defendant, in order to ascertain whether alien or British custom was due for them, a paper under his hand, being an affidavit he had made at the Custom-house, was given in evidence, he swearing in it that the wine was his. Pasch. 4 Geo. B. R.

#### [A. b. 4] Almanack.

1. In error of a judgment given in Linn, the error affigned Le. 242. pl. 3 . N. S. C. was, that the judgment was given at a Court held there on the 16th adjudged acday of Feb. 26 Bliz. and that this day was Sunday, and it was for cordingly. and cites it found by examination of the almanacks of that year; upon which to have been it was ruled that this examination was a fufficient trial, and that Ld. Carlin's a trial per pais was not necessary, although it were an error in time in one fact; and fo the judgment was reverfed. Cro. E. 227. pl. 12. Robert's Pafch. 33 Eliz. B. R. Page v. Faucet. Cafe, and

that fo was the Cafe of Galery v. Bunbury.

2. Upon evidence in a trial at bar the question was, if one was of full age at the time of his will made by him; and upon evidence it appears that he was born the 14th of Feb. 1608, and he made his will when he was of the age of 21 years within two days; and to prove his nonage, the defendant produced an almanack in which his father had writ the nativity of the devisor, and it was allowed to be ftrong evidence. Raym. 84. Mich. 15 Car. 2. B. R. Herbert v. Tuckal.

3. Though in moveable terms the Court is not bound to take notice on what day of the month the returns are, yet when it is alledged of record what day of the month the return is, the Court may take notice of it, and the day of return fall be tried by al-[ 84 ] manacks and not per pais, and cites 3 Cro. 227. quod fuit concessum per Curiam. Sid. 300. Mich. 19 Car. 2. B. R. in Case

of Courtney v. Phillips.

Ibid. St. 4. The almanack is part of the law of England, of which the Trin. 2 Court must take judicial notice; per Cur. 11 Mod. 41. Mich. Ann. in 2 Ann. B. R. in Case of the Queen v. Dyer. Cafe of

Brough v. Perkins, per Holt Ch. J. the S. P. but fays that the almanack to go by is that annexed to the Common Prayer Book.

## [A. b. 5] Antient Deeds.

1. Deeds before time of memory may be given in evidence. 2 Sid.

146. cites 12 H. 4. 23.

2. The opinion was, that a deed which was before time of memory may be given in evidence, but not pleaded, which fee in Avowry, 12 H. 4. 21. For the plaintiff in avowry pleaded release of the rent, by H. fon of the empress, then duke of Normandy, and after pleaded also confirmation thereof by this same H. when he was king of England, viz. H. 2. and there the letters patents of the King (as the faid confirmation) may be pleaded, yet because the principal deed was a deed by him when he was duke and subject, which cannot be pleaded, because it is before time of memory, and cannot be tryed, yet it may be given in evidence, by which he pleaded, hors de fon fee, and gave the deed in evidence. Br. General Issue, pl. 56. cites 12 11. 4. 21. 23.

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3. In annuity they were at iffue upon traverse of prescription, the plaintiff gave a deed in evidence, bearing date after t me of limitation, feil. after the time of R. I. and the defendant would have demurred in law upon it, and well might per Cur. by which the plaintiff would not have it for evidence, but gave other evidence. Br. General

Iffue, pl. 55. cites 34 11. 6. 36.

4 In the case of a charter of seosiment, if all the witnesses to the deed are dead (as no man can keep his witnesses alive, and time weareth out all men) then a continual and quiet possession for any length of time will make a strong or violent presumption, which stands for proof; for ex diuturnitate temporis omnia præfumuntur folenniter effe acta; also the deeds may receive credit per collationem figillorum, scripturæ, &c. And super fidem chartarum mortuis tellibus, erit ad patriam de necessitate recurrendum. Co. Lit. 6. b.

5. An antient deed is good evidence, without proving or feal on it. 1 Keb. 877. pl. 27. Pafch. 17 Car. 2. B. R. Wright v. Sherrard.

6. A deed found in archives of the chapter of Hereford, was read to prove an endowment of a vicaridge, being but concurrent evidence, though it appeared not to have been ever fealed or delivered. 2 Keb. 126. pl. 79. Mich. 18 Car. 2. B. R. Smith v. Rawlins.

7. An antient writing that is proved to have been found among ft deeds and evidences of land, may be given in evidence, although the executing of it cannot be proved; for it is hard to prove antient things, and the finding them in fuch a place is a prefumption they were honeftly and fairly obtained, and preferved for use, and are free from suspicion of dishonesty. Try. per Pais, 220. cites 24 Car. B. R.

8. An original leafe could not be produced, being an antient leafe, but the grandfon of the leffor produced a counter-part found among the evidences of his grandfather; this was allowed for evidence, though there was no subscribing witnesses to it; for Justice Windham faid, he had feen many deeds in Queen Elizabeth's time without any. Lev. 25. Paich. 13 Car. 2. B. R.

Garret v. Lister.

9. Where a deed before time of memory is supported by usage, As to the after fuch deed is pleadable and good, but that the books which fay date of the deeds before time of memory shall not be pleaded, are to be in- pleadable tended deeds of fuch liberties and franchifes, as cannot be claimed or though time supported by usage in pais, as if one claim goods of felo de se by deed [ 85 ] before time of memory, he cannot shew his deed, and tay virtute out of meeujus, &c. but must shew an antient confirmation, or a claim mory, beand alleguage in Engage Coin this and alleguage in Engage Coin this and alleguage in Engage Coin this area. and allowance in Eyre; so in this case, if they had pleaded the a private deed, and relied upon it virtute cujus, &c. it had been naught; deed; but but when they shew the deed, and likewise a usage to support it, grants of franchises it is fufficient. Skin. 239. pl. 4. Mich. I Jac. 2. B. R. James and liberand Trollop.

ties must be allowed in

Eyre, and fo my Ld. Roll in his Abridgment (1 Roll. 649. pl. 8.) is to be understood, whereupon judgment was affirmed. 2 Mod. 320. 322. S. C.

to. An old deed is good evidence without any witness to swear that it was executed; per Holt Ch. J. 3 Salk. 154. pl. 6. Hill.

8 W. 3 B. R. Lynch v. Clerke.

11. Whether the indorfements on a bond by the obligee, after his death and after thirty-five years entering into it, shall be given in evidence at law to take off an objection to the antiquity of the bond. 8 Mod. 278. Trin. 10 Geo. Serle and Barrington.

## [A. b. 6] Antient Tables of Duties.

1. In the case of water-baillage in the city of London, evidence of constant payment, and their antient tables of duties imported, was judged sufficient, though it was urged there could be no prescription for it, and judgment accordingly for desendant.—2 Show. 48. pl. 33. Pasch. 31 Car. 2. B. R. King v. Carpenter.

# [A. b. 7] Apprentices Indentures.

1. 8 Ann. cap. 9. f. 43. No indenture of apprenticeship to be ad-

mitted in evidence, unless oath made, that duties are paid.

2. It was ruled by Holt Ch. J. at summer assistes at Rigate, 10 W. 3. that the service of an apprenticeship seven years beyond the sea, though the desendant was not bound, excuses from the 5 Eliz. cap. 4. Ld. Raym. Rep. 738. Frith v. Torin.

## [A. b. 8] Appropriations.

1. A man had got a prefentation to the parsonage of Gosnal in Lincolnshire, and brought a quare impedit, and the defendant pleaded an appropriation; there was no licence of appropriation produced, but because it was ancient the Court would intend it. Said per Hale Ch. J. in 1 Mod. 117. pl. 17. Pasch. 26 Car. 2. Green v. Proude.

## [A. b. 9] Arreft.

1. Where the issue was upon an arrest, the plaintiff demurred upon the evidence, because the defendant who pleaded it had not produced the process itself, because matters of record cannot be tryed but by themselves. Sid. 105. pl. 13. Hill. 14 & 15 Car. 2. B. R. Bryan v. Fitzharris. It was agreed per Cur. that the writ ought to have been produced in evidence; but by the demurrer the arrest (being matter of sact) is confessed, though it be such matter of sact as is to be proved by matter of record, and the jury might know of their own knowledge that there was a writ, and the judgment was assirtmed. Lev. 87. Fitzharris v. Bojen. S. C.

#### [A. b. 10] Asfault.

1. In trefpals of affault, battery, and wounding, the defendant pleaded the plaintiff began first, and the stroke he received, whereby he lost his eye, was on his own assault, and in defence of the defendant; and on trial at the bar now by evidence it appeared the plaintiff threatned the defendant, and said, Were it not assist time he would tell him more of his mind, which was said bending his sist, and with his hand on his sword; yet per Cur. this is no assault, as it would be without that declaration; but it was farther sworn, that the plaintiff with his elbow punched the defendant, which if done in earnest discourse, and not with intention of violence, is no assault, nor then is it a justification of battery after a retreat, as Phineas Andrew's Case; and the jury not believing the defendant, found for the plaintist, and gave 500 l. damages. 2 Keb. 545. pl. 13. Mich. 21 Car. 2. B. R. Turbervile v. Savadge.

2. In action of battery, which was laid in the declaration to be the 18th day of February 1621 defendant pleaded fon affault demesse, &c. and at iffue upon that, and defendant proved an affault by the plaintiff, but another day, and ruled that this doth not prove this iffue for the defendant, because the justification shall refer to the time laid in the declaration, if the defendant do not difference the times in his plea; and in such case, when the defendant intends to shew the affault was at another day and place, he shall shew that such a day before that in the declaration, as here 8th February the plaintist did him affault, and would have beaten him, and traverse the day in the declaration. Clayt. 110. pl. 187. March, 24 Car. Turner Serjeant, Judge of Assis. Hardcastle v. Lockwood.

3. But see in the case of an officer, who is not tied up to special pleading, it seems he upon not guilty may vary in his evidence to justify from the time in the declaration, &c. Quod nota. And the prejudice may come to the plaintiff's being unprovided perhaps in such case to a reply; whereas when the matter is by pleading brought to a special issue, he knows his work, &c. Clayt. 110. 24 Car. Hardcastle v. Lockwood.

## [A. b. 11] Attorney's Bill.

1. Attorney's bill, though not figned, is evidence for his executors, as well as for himself, and perhaps several of the things could not in their nature be proved by record; per Holt. Cumb. 348. Mich. 7 W. 3. B. R. Blackeler v. Crosts.

## [A. B. 12] Belief.

1. It is no fatisfaction for a witness to say, that he thinks or per- Vid. tit. fuades himself, and this for two reasons, by Coke; 1st, Because Apportion-

86

meat (A) Wirth v. Viner.

the judge is to give absolute sentence, and ought to have more ground than thinking. 2d, That judges, as judges, are always to give judgment fecundum allegata & probata, notwithstanding that private persons think otherwise. Dy. 53. b marg. pl. 15. Mich. 10 Jac. in the Star-Chamber. Adams v. Canon.

## [A. b. 13] Beyond Sea. Things done there.

S. C. cited by Holt Ch J. 2 I.d. 935. Trin. 2 Ann.

87

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1. A ship was Dutch built, and after made an English ship, the master was Dutch, some of the seamen English, and two Dutch; Kaym Rep. there being a war betwixt the French and Holland, the French feize the thip as a Dutch thip, and condemn her as a Dutch ship in the Court of Admiralty in France; the is there fold, and after coming into England, the first owner seifes her, and the other brings trover, and a special verdict was found; but the Court would not fuffer it to be argued, but ordered judgment to be en-I tered for the plaintiff; for they faid, that fentences in the Courts of Admiralty ought to bind generally according to jus gentium; and that if we did not observe the sentences given abroad, they would not observe ours, which would be a general inconvenience; and if the merchant in this case had received wrong, he ought to apply to the Admiralty and Council, this being a matter of government; and that the King, if he faw cause, would fend an embassador lieger into France, who would take care that right should be done; and that if right be not done, then the King would grant letters of marque and reprifal; and in this case they remembered Cottinton's Cafe. Skin. 59. Mich. 34 Car. 2. B. R. Hughes v. Cornelius.

3 Salk. 381. 2. Leffor brought debt for rent against leffee upon a demise at London of lands in Jamaica, which was held to be well, being v. Gally, S. C -6 Nod. founded on the privity of the contract, which is transitory; but 19. S. C. if a fereign iffue, which was local, should happen, it may be held actried where the action is laid, and there may be a fuggestion on cord ngly ; the roll for that purpose, that such a place in such a county is feedant up- next adjacent, and there it may be tried by a jury from that place on nil debet according to the laws of that county, and upon nil debet may give pleaded you may give the laws of that country in evidence. or the law 2 Salk. 651. pl. 31. Trin. 3 Ann. B. R. Way v. Yalley.

of the country in evidence, if there was such an one, i.e. (that the house being burnt it should be rebuilt, and a reparation made to the leffor by act of state) and this we see every day done before committees of appeals from thence. In an action of imprisonment brought here against the Governor of Jamaica for an imprisonment, there the laws of the country were given in evidence.

> 3. In trover and conversion, the custom of India was found concerning the buying and felling of flaves, and it was held that the action would lie well enough. Freem. Rep. 452. pl. 616. Trin. 1677. B. R. Anon.

> 4. To prove a delivery of goods to the defendant, an exemplification of an entry made in the custom-house of Rotterdam, and attested by a publick notary, and sealed with the publick seal there was offered

offered in evidence, but the Court would not admit it. 8 Mod. 75.

Pafch. 8 Geo. the King v. Mafon.

5. Per Ld. Chan. Mich. 10 Geo. where a fuit is for a debt or other thing, a fentence in another country is not binding; but the Court here must examine into the matter, in order to form a judgment; contra, where the fuit here is in order to carry that fentence into execution, for then the proceedings here are founded upon the fentence, and not upon the debt.

6. Exemplification of a fentence given in a foreign country, shall be read as evidence here to prove that fuch fentence was given there without any further proof. 9 Mod. 66. Mich. 13 Geo.

Anon.

7. Copy of an agreement registered in Holland, and attested by a public notary there, may be given in evidence for defendant, especially since he proved that the plaintiff took out another copy of the fame agreement, and would not now produce it, so he knew the egreement, and could not be furprifed. 8 Mod. 322. Mich. 11 Geo. Walrond v. Van Mofes.

8. Affidavit by a plaintiff in Holland attested by a publick notary, shall be admitted as good evidence to hold defendant to special bail here. 8 Mod. 323. Mich. 11 Geo. Walrond v. Van Moses.

9. A. draws a bill of exchange on B. who is refident at Legharn, Cases in payable to C. three months after date; the bill is negotiated Chan. in through several hands, and indersed to one who lived at Leghorn. B. Time, 69. accepts the bill, and about a week afterwards B. had advice, that s. c. A. had estopped payment, and he refused to pay, and by a fuit in Court at Leghorn, B. got a fentence to be discharged from the acceptance and payment. He brought a bill for injunction and was relieved, and he infified upon the fentence at Leghorn. Mich. 13 Geo. [ 88 per Ld. Ch. King, the Court at Leghorn had jurisdiction of the thing, and of the person, and he cited the case of a person that committed murder in Portugal, and was tried there and acquitted, and afterwards upon a profecution here on statute H. 8. he alledged the former trial, and it was allowed. V. the Cafe of the Admiralty Jurisdiction in R. A. b. A suit is for seamens wages in the Admiralty, and there is a difmission, this allowed on non affumpfit at law; objected, that this fentence was matter proper for defence at law, and that the fentence was wrong in itself, not sufficient proof there of A's insolvency, but by certificates of three merchants, which is no proof-here, that this was of acquittal of acceptors, for infolvency of the drawer is not the general law of merchants, nor local at any other place; but Ld. Ch. thought he was bound by fentence, and he relied upon the fentence, and perpetual injunction granted; he faid, that when he was Ch. J. he always allowed foreign fentences to be given in evidence. Debt contracted in Holland by work done, the party comes here, he shall be liable according to the civil law, and bill and relief. Mich. 13 Geo. Canc. Burrows v. Temineaw.

Not good

against his

evidence

aliente.

## [A. b. 14] Bill and Answer in Chancery.

1. The infant guardian's answer in Chancery of a feoffee in trust, was refused by the Court to be given as evidence; because he was living, and not party to the fuit, which was only between the heir, and cestus que trust. Keb. 281. pl. 83. Pasch.

14 Car. 2. B. R. Anon.

2. Allegations by a complainant in a bill in Chancery shall by a copy be made use of as evidence against the complainant in a fuit at law, for it shall be intended to be exhibited by his consent and privity; but per Bridgman, there is a difference when there is a proceeding upon fuch bill, and when not; for in the first case, it shall be admitted in evidence, but in the fecond not. If bill be preferred fans privity of the plaintiff, an action lies. Sid. 221. M.ch. 16 Car. 2. B. R. Snow v. Phillips.

3. Bill in Chancery allowed in Dom. Proc. as evidence to con-

front a woman who pretended marriage. Parl. Coll. n. 88.

4. An answer in an English Court is good evidence to a jury against the defendant himself, but not against other parties, yet it is not binding to the jury. Godb. 326. pl. 418. Pasch. 21 Jac. 1 Saik. 286. B. R. Anon.

-1 Mod. 30: .- 6 Mod. 44. Mich. 2 Ann. B. R. in Case of Ford v. Ld. Grey.-

> 5. If the plaintiff will read the defendant's answer in Chancery against him in evidence, the defendant may likewife take advantage thereof; for all is evidence, or none. 3 Salk. 154. Hill. 8 W. 3. B. R. per Holt Ch. J. Lynch v. Clerke.

> 6. An answer in Chancery cannot be given in evidence, for the party who made it, or against a third person not deriving any title under him. 8 Mod. 181. Trin. 9 Geo. Hilliard v. Phaley

& al.

## [A. b. 15] Books.

1. Scrivener's book to prove a confideration paid (as a tradefman's book) is no evidence for himself, but for any other it is; so a tradesman's book after his death.—We have allowed a burser's book of a colledge for evidence, per Holt. Cumb. 249. Pafch. 6 W. and M. in B. R. Smart v. Williams.

2. Per Holt. The book of a man that keeps regular entries, might be evidence for him. Cumb. 348. Mich. 7 W. 3. B. R.

Blackeler v. Crofts.

[ 89 ] 3. Shop-book allowed as evidence on proof of the fervant's hand that entered it, and that was used to make the entries, (he being dead) and no proof was required of the delivery of the goods; and per Holt Ch. J. though the statute 7 Jac. 1. 12. says, a shopbook thall not be evidence after the year, &c. it is not of itself evidence within the year. 2 Salk. 690. pl. 2. Hill. 11 W. 3. Pitman v. Maddox in Middlesex .- I Salk. 285. Price v. Ld. Torrington.

4. Or-

4. Ordered that the register-books of a dean and chapter should be made use of at a trial, for they are public books. Comb. 247. Pasch. 6 W. and M. in B. R.

So of transfer books of the E. India company, &c. For they are the books of a public company, and kept for public tranfactions in which the public are concerned, the books are the title of the buyers of stocks by act of parliament. 7 Mod. 129. Hill.

I Ann. B. R. Gery v. Hopkins.

5. Evidence of beer delivered was thus, the draymen came 2Ld. Raym. every night to the clerk of the brewhouse, and gave him account S. C. held of the beer they had delivered out, to which the draymen fet their accordingly bands, and that the drayman was dead, but that his hand was fet by Holt Ch. to the book; and that was held good evidence of a delivery. J. I Salk. 285. pl. 13. Trin. 2 Ann. coram Holt Ch. J. at nisi prius at Guildhall. Price v. the Earl of Torrington.

6. Shop-book of itself fingly without more is not sufficient; ut

fup.

. How far entries in a treasurer's books shall not be allowed to be evidence against the partners whose treasurer he is. Barnard. Chan. Rep. 417. Hill. 1740. Smith v. the Duke of

3. If an action be brought by a shop-keeper for money due on a fale of goods, we never inforced him to produce his books; but if very flender evidence be with him, then if he will not produce his books, it brings a great flur upon his cause. Per Cur. 6 Mod. 264. Mich. 3 Ann. B. R. in Cafe of Ward v. Apprice.

9. A church-book was given in evidence, to prove the nonage of Mo. 417, the plaintiff, at the time of a lease made by him; and judgment for 4:2. pl. the plaintiff. Cro. E. 411. pl. 1. Mich. 37 & 38 Eliz. B. R. 616. S. C.

Vicary v. Farthing.

10. The plaintiff exhibited his bill in the Exchequer for tither of houses in the parish of St. Hellen's in London, according to the statute 37 H. 8. the defendants in their answer set forth a customary payment in lieu of all tithes, and thereupon a trial was directed at law; and now the plaintiff exhibited another bill against the parishioners, that the leiger-book in their custody might be produced in evidence at a trial, which book concerned him, as well as the parish; and upon a demurrer to this bill, because it was only to provide himself of supplemental evidence after hearing the cause, it was decreed, that the demurrer was ill, because the bill was to have supplemental evidence in the same cause, and in the fame way of proceeding, but collateral to it, viz at a trial at law; besides these are common evidences for both parties, they are like court-rolls, which belong as well to the tenants as to the lord of the manor, and therefore they may bring a bill to have the use of them. Hardr. 180. Pasch. 13 Car. 2. in Scacc. Langham v. Lawrence.

11. The entry of the names and titles of persons in a church-book, either for marriages or births, (though not forged) cannot be pofitive

fitive evidence of the marriage or birth of any persons, unless the identity of the persons by such entries intended be fully proved, and also strengthened with circumstances, as cohabitation, the allowance of the perfons themselves, &c. Draycot v. Draycott. Parl. Coll. n. 88.

I 90

12. Survey books of a manor, which are antient, unless signed by the tenants, or they appear to be made at a Court of Survey are no evidence; they are else only private memorials; per Baron at Exon. Summer 1719.

13. But old court-rolls are evidence. So rentals, or accounts of money received by the steward were allowed at Winchester and

Dorchester ashses, Lent 1719, coram King Ch. J.

14. But rentals without money received and paid upon them are

nothing, but payment makes them of effect. Ibid.

15. A corporation book was offered in evidence to prove at the affifes a member of the corporation not in possession and refused. I Salk.

288. p 26. Pafch. 7 Ann. B. R. Wright v. Sharp.

16. The books of a corporation, containing their public acts are very proper evidence, yet fome account ought to be given of them by whom kept, &c. and a book fent in 1707 during the mayoralty of Sharpe, and entries made therein by him, or by his party in the corporation of elections and other public acts, but not produced by the town-clerk, &c. were disallowed, and this was agreed per Cur. B. R. on motion for a new trial; it looks as if the book was made for a particular purpose, there being no other acts entered in it by the proper officer, nor any acts but of this mayor only who has been adjudged no mayor; yet their common books are evidence in regard they contain a register of their public transactions. Pasch. 4 Geo. B. R. Case of Thetford.

17. In a case between Dr. Bennet and inhabitants of Cripple. The Lieger gate, the parish-books were admitted as evidence both for the of a Priory plaintiff and defendants, as also books belonging to the dean and chapter of St. Paul's, in which were entered leases made by the pre-Frove right decessors of the lessor's vicars of Cripplegate. In this case the Court of B. R. ordered plaintiff should have an inspection of the parish Mich. 1657. books, and copies of what he pleafed. Coram Prat Ch. J. Hill.

Cafe of the 5 Geo. apud Guildhall.

Aldermen of London v. Hafting:

2 Sid. 3.

was evidence to

et fishery.

B. R. in

7 Jac. 1. 12. None keeping a shop-book, his executors or administrators, shall be allowed to give it in evidence for wares or work above one year before the action brought, unless they have obtained a bond or bill for the delt, or brought an action thereupon within one year after the wares delivered, or work done.

This act shall not hold place between merchant and merchant, tradefmen and tradefmen, or merchant and tradefmen, for any thing falling within the compass of their mutual trades and merchandice.

Provided always, that this all, or any thing therein contained, shall not extend to any intercourse of traffick, merchandizing, buying, selling; or other trading or dealing for wares delivered, or to be delivered, mo-

ney due, or work done, or to be done, between merchant and merchant, merchant and tradefman, or between tradefman and tradefman, for any thing directly falling within the circuit or compass of their mutual trades and merchandize; but that for furb things only, they and every of them shall be in case as if this act had never been made, any thing

herein contained to the contrary thereof not with flanding.

18. At Guildhall; in ejectment for a meffuage in London, it was objected against the title of the plaintiff, that this was a mefluage above 401. per ann. rent, and that the custom of the city is, that there ought to be warning given for the space of half a year where the meffuage is of fuch a rent, and by the space of a quarter of a year, where it is under fuch a rent; and an antient book in French was produced in which fuch custom was registered; the [ 91 ] which was allowed to prove the custom. Skin. 649 pl. 7. Trin. 8 W. 3. B. R. Tyley v. Seed.

19. A shop-book was allowed as evidence in indebitatus af- Ld. Raym. fumplit on a taylor's bill, it being proved, that the fervant that writ S. C. held the book was dead, and this was his hand, and he accustomed to make accordingly. the entries, and no proof was required of the delivery of the goods; and the Ch. J. faid, it was as good evidence as the proof of a witness's hand to an obligation, and held, that though 7 Jac. cap. 12. Jays, that a Shop-book Shall not be evidence after the year, &c. that it is not of itself evidence within the year. 2 Salk. 690. pl. 2. Hill. 11 W. 3. Pitman v. Maddox.

20. The book of any merchant is no good proof, nor may be allowed to be read touching any debt due to him; but as to any debt against himself it may be good enough. Keb. 27. in pl. 68. Pasch. 13 Car. 2. B. R. cited by Twisden, as the Case of LEE v.

LEE, and this was agreed by the Court.

21. Shop-books have fometimes been allowed to be read as evidence at the hearing, and fometimes rejected. Toth. 91. Cary's

Rep. 45.

22. In evidence to a jury, Twifden observed a Case between Lee and Lee, that the book of any merchant is no good proof, nor may not be allowed to be read touching any debt due to him, but of any debt against himself it may be good enough; which was agreed per Cur. Keb. 27. pl. 78. Paich. 13 Car. 2. B. R. Crouch v. Drury.

23. Where a man is charged only by an oath or book, the same shall Where be his discharge, especially where the parties are dead which books were amounted to length of time, which was held a good reason for alearthquake lowing it; as where an executor had kept a book of accounts, re- at Smirna, lating to her former husband's estate, and then she married R. fo that and the same was kept and continued on; and R. going go-could charge vernor abroad, fhe went with him, as did the fervant that kept defendant the book of account, and it was proved, that the book was made up only by defendant's from vouchers, and had paid great part of the monies, and the own books, witnesses believed all the monies paid, and plaintiff charged de- the same fendant only by the book; decreed per Ld. Wright. Mich. books were 1701.

be his dif- 1701. Abr. Equ. Cases. 10. Darston and Earl of Oxford v. Excharge.
Abr. Equ. ecutors of Colonel Ruffell.

Cafes, 10. cited as then lately adjudged, in Case of Mellish v. Turner.

> 24. A printed book being an inventory of the estate of late South-Sea flock, which was directed to be made by an act of parliament, and to be left with one of the Barons of the Exchequer, and published by the Speaker was allowed as evidence per King Chan.

Trin. Vac. 1727.

25. Pasch. 6 W. & M. B. R. it was said, per Curiam, that a shop-book is not evidence for the tradesman, but is good evidence against him, or for a stranger. The same law of a scrivener's book for money paid by him, or received to the use of a stranger, or the book of a burser of a colledge. Ex relatione Magistri Place. Ld. Raym. Rep. 745. Anon.

#### [A. b. 16] Certificates.

1. In debt against sheriff of Bucks, for the reward given by the statute 6 & 7 W. & M. to those that should discover and convict clippers and coiners. Note; here plaintiff had a certificate from my Lord Ch. 7. Holt, who tried the malefactor, of his having been convicted on the plaintiff's evidence, which being produced, though under my Lord's hand, yet it was proved by my Lord's clerk to the jury. 12 Mod. 310. Mich. 11 W. 3. Bignoll v. Rogers.

2. The certificates of clerks of affife or peace are made fufficient evidence of a person's being convicted and ordered for transportation, fo as to make him guilty of felony without benefit of clergy for

returning. 6 Geo. 20. f. 7.

## [A. b. 17] Chancery. Proceedings there.

1. An answer in Chancery may be given in evidence to a jury against the defendant himself, but not against other parties; per Ley Ch. J. Chamberlain and Doderige J. Godb. 326. pl. 413.

Pasch. 21 Jac. B. R. Anon.

2. A bill in equity in the Court of Wards was exhibited against two defendants, one of them in his answer claimed a title, but the other did not, but fet forth several things in his answer to make out the title of the other defendant, and in action between other parties concerning the same title, it was moved that this answer might be given in evidence, but it was denied; but by Chamberlain J. his answer might be given in evidence against himself. 2 Roll. Rep. 311. Pasch. 21 Jac. B. R. Berisford v. Philips.

3. Defendant's answer in an English Court is a good evidence to be given to a jury against defendant himself, but not against was object. others. Godb. 326. pl. 418. Pasch. 21 Jac. B. R .- If dethat it fendant's answer be read to the jury, it is not binding to the jury,

[ 92 ]

Upon producing the

answer it

[ 93 ]

jury, but it may be read unto them by the affent of the parties. could not be read, not being taken off

the file, but only in custody of one of the Six Clerks; but Powel J. said it might be read on swearing the Six Clerk, and so it had always been held. 11 Mod. 276. pl. 25. Hill. 8 Ann. B. R. Riley v. Adams.

- 4. In Hillary term, 22 Jac. a commission issued to examine witnesses returnable in Easter term following; the commissioners began to examine on Monday the 28th of March 1625. which was the day after the death of the King, and continued examining till Friday following, and then, and not before, they had notice of the demise of the King, yet it was adjudged that the depositions should stand, especially it being in a Court of equity, where the proceedings are de jure naturali, and not by the strict course of law; and if any witnesses examined on such commission should be perjured, he might be punished by the statute 5 Eliz. cap. 9. For being examined before notice of the King's demise, what they did was legal. Cro. C. 97. pl. 24. Mich. 3 Car. C. B. Crew v. Vernon.
- 5. Payment by decree in Chancery is not pleadable at law, or to Nell Chan. be given in evidence there, and in fuch case a bill in equity Rep. 74. S. is the proper remedy. 3 Chanc. R. 3. 13 Car. 2. Jones v. C. decreed.

  S. C. Bradshaw.

  Vern. 57. Pach. 1688.
- 6. By Twisden, decreetal order under the seal of the Exchequer, which recites all the proceedings, or exemplifications, &c. under the Great Seal hath been allowed to be read as evidence; but by Aleyn not unless it have the bill and answer, which Windham agreed. But by Twisden, where the decree is produced only in paper, then the bill and answer ought to be adjoined, but not so when the decree is under seal. And in C. B. Stiff v. Stiff, the judges admitted a decree to have been under seal; and yet would not allow it without bill and answer. And by Aleyn, it is usual to disallow such decrees, but an exemplification of the Chancery, per Cur. always recites the bill and answer. Moreton Serjeant said, he never did see the seal of any Court denied to be given in evidence. I Keb. 21. pl. 62. Pasch. 13 Car. 2. B. R. Trowel v. Castle.
- 7. At hearing the cause, the plaintist offered to give in evidence a bill formerly exhibited against him by the now defendant; it was objected, that it ought not to be given in evidence, unless it was proved that it was exhibited by the order, direction, and privity of the defendant; for any man may sile a bill in another's name, and the Court was of the same opinion. N. Ch. R. 102. 16 Car. 2. Woollet v. Roberts.
- 8. It was objected, that a bill in Chancery is no evidence, because it only contains matter suggested perhaps by a counsel or solicitor, without the privity of the party; but per Cur. after debate the copy of the bill against the same party was admitted as evidence, for they said they would not intend that it was pre-

ferred without the privity of the party, and if it was, he had good remedy against them that so preferred it by action fur case, but they faid that this evidence is not fo valid as a letter of the party and note; and it was not urged, that the defendant had answered in Chancery, and they had proceeded upon it, which, as it feems to me, is the better reason why it shall be allowed to be evidence, for the profecution of the plaintiff takes away that objection, that it might have been preferred without his privity by a And the fittings after the term, at Guildhall London in C. B. where I was a counfel, when a bill in Chancery was offered as evidence, Bridgman Ch. J. demanded if there had been any proceedings upon it, otherwife he would not allow it; and because the answer to the bill, and other proceedings upon it were shewn, it was allowed for evidence. Sid. 221. pl. 8. Mich. 16 Car. 2. B. R. in Cafe of Snow v. Phillips.

9. A bill in another cause is no evidence against the plaintiff in it, unless it be proved to be exhibited with his privity. Chanc.

Cafes 64. Hill. 16 & 17 Car. 2. Woollet v. Roberts.

10. In evidence in a trial at bar by lease of one Wright, an answer of one Lewis Mordant surviving trustee, under whom the plaintiff claimed, was offered, but being after a conveyance made by him the Court refused; but had it been before, per Windham and Moreton, it would be good against all claiming under him; which Twisden denied, because an answer doth not discover the whole truth, and therefore shall be admitted only against the party himself that made it, and not of one defendant against another, much less against a stranger. 2 Keb. 424. pl. 57. Mich. 20 Car. 2. B. R. Mills v. Barnardifton.

It is no evidenceagainft 197. pl. 9.

12. Upon trial of a title of land, a bill in Chancery was given that prefers flight moment. Vent. 66. Pafch. 22 Car. 2. B. R. Mews v. it. Gibb. Mews. in evidence against the complainant, though it was held to be of Mews.

Hul. 4 Geo. 2. B. R. Ferrers v. Shirley.

13. It was faid that a voluntary affidavit before a Master in Chancery cannot be given in evidence at a trial. Sty. 446.

Pasch. 1655. Anon.

14. The defendant obtained an injunction in this Court; the defendant moves to dissolve it, and obtained an order to dissolve it; before the order was drawn up the defendant arrests the plaintiff; and it was held clearly that this was a contempt to the Court, and the defendant was ordered to be committed; for it is no order till it is drawn up and paffed by the register, for the register's minutes are only a warrant for an order, and no order. 2 Freem. Rep. 46. pl. 51. Mich. 1679. in Curia Canc. Anon.

15. An answer in Chancery is evidence of a deed against all that claim under that person, and reputation of claiming so is sufficient to put a party upon shewing another title. Ld. Raym.

Rep. 311. Hill. 9 Will. 3. the Earl of Suffex v. Temple.

16. Anfaver

16. Ansaver in Chancery is not to be admitted as evidence at At a trial at common law, unless proved to be sworn by him against whom it is bar an anproduced. 2dly. It ought to appear that that part of it which is Chancery, given in evidence be pertinent to the matter contained in the bill, for though not else it shall be accounted void and superfluous; per Holt Ch. J. swen in eviat Guildhall. Cumb. 473. Pafch. 10 W. 3. B. R. Kingston v. dence, be-Read.

cause it was proved to

have been filed in the Six Clerks Office. 12 Mod. 231. Mich. 10 W. 3. Anon.

17. The plaintiff proving his pedigree would have given in evidence the answer of an infant by his guardian to a bill in Chancery, but it was held it could not be read. Cumb. 156. Mich. I W. and M. Ecclefton v. Speke.

18. A man makes an answer in Chancery prejudicial to his But against title, and after conveys away his estate, this answer cannot be alienorhim-felf it may read against the alienee by any claiming under alienor. 6 Mod. be evidence. 44. Trin. 2 Ann. B. R. Ford v. Ld. Grey.

1 Salk. 286.

19. An order of Chancery is not to be given in evidence, with- A decree in out producing a copy of the bill on which it was made. 6 Mod. 149. Chancery, Pasch. 3 Ann. B. R. Turner v. Nurse.

Court of Equity, is

no evidence in a Court of Common Law, as in Walfingham's Cafe. 2 Sid. 75. Paich. 1653.

20. A decree between other parties may be read as a precedent, though not as evidence. January 23d, 1717. MSS. Tab. Austin v. Nichols.

## [A. b. 18] Chirograph of a Fine.

1. Chirograph of a fine may be given in evidence to a jury. Pl. C. 410. b. Mich. 13 & 14 Eliz. Newys v. Scholastica.

2. Chirograph of a fine is of fo high a nature that no parol evi- 2 Sid. 145. dence shall be allowed to falfify it; admitted Arg. 10 Mod. 42. Hill. 1658. Mich. 13 Ann. B. R. in Lord Say and Seal's Cafe.

Witherington Ch. B.

in delivering the opinion of the Court; but he faid it cannot be delivered in evidence.

## [A. b. 19] Circumstances.

1. De morte viri, in case of dower brought by the wife after And 20. pt. the husband had been absent 7 years beyond sea, may be by circum- 42. Thorne flances; and in fuch cases, Qui melius probat, melius habet. C.-D. 185. a. pl. 68 Pasch. 2 Eliz. Thorn alias Thorp v. Rolf.

2. A man has 2 manors of D. and levies a fine of the manor of D. Circumstances may be given in evidence to prove what manor he intends. Trial (Y. e. 3.) pl. 11. cites 6, 7 E. 685. per Montague, and 12 H. 7. 6.

3. Circumstantial evidence ought never to be admitted where better may be had, ex natura rei, because circumstances are fallible and doubtful, and it is upon this reason that a copy of a record is good, because one cannot have the record itself; but a copy of a copy will not do. Arg. 12 Mod. 500. Pasch. 13 W. 3. Dillon v. Crawley.

#### [A. b. 20] Collateral Warranty.

1. Where a collateral warranty binds, this may well be given in evidence; for although it does not give a right, yet in law this shall bar and bind a right. T. per P. 157. cites lib.

[ 95 ] 2. A collateral warranty may be taken notice of as well by evidence as by rebutting. Per Powell J. 11 Mod. 103. pl. 9. Mich. 5. Ann. B. R. Smith v. Tindall.

## [A. b. 21] Comparison of Hands.

1. In debt upon a bond upon issue of non est factum, if plaintiff prove the witnesses dead beyond sea, or that he has made strict enquiry after them, and cannot hear of them, he shall be let in to prove their hands; per Holt Ch. J. at Niss Prius, 12 Mod. 607. Mich. 13 W. 3. Anon.

2. A parson's book between 1645 & 1654 was produced, to prove a modus in the parish of H. one Saunders rector, and to prove that this was his hand-writing and his name to it, one P. said he had examined the parish-books of that kind, where Saunders's name was as rector, and therefore believed the name on the book was the writing of Saunders, this was allowed to be read, because the parish-books was not in the plaintist's power to produce, and he also proved that one R. in discourse with plaintist had discovered to him, that he had these papers from the hands of one G. who was Saunders's daughter, and saw that delivered to plaintist, and R. was dead. Per Lord Chanc. 6 Dec. 1736. in Canc.

## [A. b. 22] Condemnation of Goods scised.

1. Trover for a parcel of brandy, coram Baron Price at Bodmyn, T. Vac. 1716, an information in the name of the attorney-general in the Exchequer, and an acquittal thereupon, and a judgment were given in evidence the brandy being seized, &c. to which the other side objected, but the judge refused to admit any evidence against this determination, or to let the parties in to contest the fast over again, which had been tried on the information. So if goods are condemned in the Exchequer the party shall never try this matter over again in a collateral action.

condemnation, will be the same as after the condemnation. Per King Ch. J. at Winchester, Lent 1719.

2. If goods are condemned by the Court and proclaimed as forfeited, the property is altered, so as no action of trespass or trover

All those condemnations have relation to the seifure to alter the property, so that an action at law brought after the seifure, and before the will lie by the proprietor against the person that seizeth them; adjudged by the whole Court. Raym. 336. Mich. 31 Car. 2. in Scace. Ekins v. Smith.

## [A. b. 23] Confession of one against another.

1. The question was, if the confession of an under-sheriff of an escape be any evidence against the high-sheriff; and adjudged that it is, for though the sheriff is suable, yet the under-sheriff gives him a bond to fave him harmless, and therefore it will all fall upon him. And therefore his confession is good evidence, because in effect it charges himself. Ld. Raym. Rep. 190. East. 9 Will. 3. Yabsley v. Doble.

2. Confession of delivery of goods in the Court of Requests may be given in evidence against the defendant at law. Mar. 103.

pl. 175. Trin. 17 Car. C. B. White v. Grubble.

3. In an information for publishing a libel, the defendants own So if to confession was given in evidence against him, but per Holt Ch. J. prove a debt if there was no other evidence against him but his own confest that defenfion the whole must be taken, and not so much of it as would serve dant conto convict him. 5 Mod. 167. Hill. 7 W. 3. King v. Pain.

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time, that he had paid it, this confession shall be valid as to the payment, as well as to his having owed it. Per Hale Ch. J. and so is the common practice. Try. per Pais, 209.

4. Confession is the worst fort of evidence that is, if there be [ 06 no proof of a transaction or dealing, or at least a probability of dealing, between them as in the principal case there was, the one being a failor, the other a master of a ship. Per Holt. 7 Mod.

42. Mich. I Ann. B. R. Anon.

5. A point was referved at the Sittings of Nisi Prius, whether the proof of the inderfor of a promissory-note his acknowledgment that the name indorfed on the faid note was his hand-writing, be fufficient to prove the indorfement in an action brought by plaintiff as indorfee against defendant as drawer; the objection was, that no person's confession but the defendant's himself can be evidence, and the indorfor's hand must be proved. The objection was held good; and the verdict, as to the fecond promise in the declaration, was ordered to be vacated. Barnes's Notes in C. B. 311, 312. Mich. 6 Geo. 2. Hemings v. Robinson.

6. The examination of the prisoner himself (if not on oath) may be read as evidence against him; but the examination of others (though on oath) ought not to be read if they can be produced,

viva voce; St. Tr. 1 vol. 169. 780.—2 vol. 575.
7. In Sayer's Case Mich. 9 Geo. in a case of high-treason Mr. Staney an under secretary of state gave evidence of L's confesfions, upon his examination before the council, which though taken in writing, yet the writing was not read.

8. Where there is any confidence or trust between the parties, the confession of one in an answer, &c. might be given in evi-VOL. XII.

dence against the other, though it might be a question if conclusive or not. Per Ld. Chanc. 8 Mod. 180. Trin. 9 Geo-Hilliard v. Phaley.

#### [A. b. 24] Conspiracy.

t. In conspiracy for indicting him of felony, &c. the plaintiff was put to prove the indictment now showed in evidence a true copy, then he was put to prove what the witness swore to the jurors, who did procure them to swear and give such evidence; and proof was, that one W. gave the evidence to the jury of life and death, that the plaintiff shole the goods, &c. but the witness now in Court swore, that his oath was the plaintiff took them, but not that he shole them; it was found for the defendant, ut credo. Clayt. 126. pl. 224. March 1647. B. R. Burnley's Case.

2. Holt Ch. J. expressly declared, that these kinds of actions are not to be encouraged, but that the judge before whom any of them are tried ought to hold the plaintiff to a proof of express main delivering the opinion of the lice in the defendant in his prosecution by way of indictment, for ing the opinion of the lice, the action is not maintainable, but the plaintiff must a salk. 13. be nonsuit. Carth. 417. Trin. 9 W. 3. B. R. in Case of Savil 35. pl. 5.
3 Salk. 16. v. Roberts.

S. C. accordingly.

2. In an action of conspiracy for indicting the plaintiff of felony, and the defendant in his defence did prove he had goods stolen, and thereufon did prefer an indictment which was found ignoramus, and then it was proved he did prefer a second indicament, after he had notice the goods were taken by another and paroned to the plaintiff, and for this the jury found him guilty, and that malice was in this profecution, which is the chief cause to maintain this action; and moreover it was proved, that the defendant had brought actions at law, which was a civil proceeding for the fame goods fupposed to be stolen, which was urged to shew the malicious profecution; but for this, the judge held this of itself would 97 ] not maintain this action, for the party whose goods are stolen, may proceed both ways without malice; and also it was held a fecond indicament may be preferred upon better evidence, without making the profecutor liable to this action; fo note it was the notice of the matter abovefaid only did maintain this action; but fee by me how the defendant was bound to believe fuch notice, &c. Clayt. 85, 86. pl. 144. July, 16 Car. Johnson v. Stanclif.

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3. In information for conspiracy and attempt to rob Sr. Robert Gaire, and binding themselves by oath to execute the same, and lying in wait, &c. they as to the oath was out of the county, viz. at the Devil Tavern, which is in London, wherefore not regarded, no overt act, or lying in wait was proved, without which, per Curiam, the information will not lie, as 2 Inst. and verdict for

the defendant, there being no certain appointment of time, place or person, &c. 3 Keb. 709. pl. 58. Trin. 29 Car. 2. B. R. the

King v. Parkehurst and Elling.

4. If two or three persons meet together, and discourse and conspire to accuse another falsely of an offence, it is of itself an overtact, and is indictable. Per Holt Ch. J. but per Powell J. that to make a meeting to consult and conspire criminal, they ought to come to some resolution. II Mod. 55. Pasch. 4 Ann. B. R. in Case of Queen v. Bass.

## [A.b. 25] Constat.

1. If a man has lost his letters-patents, he may have new letters-patents out of the Chancery, if he shews to the Chancellor, that he has lost them, per Fisher quære inde, for it seems, that he shall not have but a constat, & non negatur ibidem. But admitted upon the argument, whether he shews the letters-patents of the gift of the King, or not, but that he has lost his letters-patents, and has a new patent, that it shall be intended a constat, as it seems to me, that in this case it shall serve him to shew or plead, as well as the first patent. Br. Patents, pl. 58. cites 22 H. 7. 12, 13.

[A. b. 26] Copies.

- 1. In ejectment, the jury found that the lessor of the plaintist had released all right in the land to J. S. but they found, that the release itself was not shewn to them, but a copy thereof. Per tot. Cur. This release may well be found thus to defend a possession. Cro. E. 863. pl. 41. Mich. 43 & 44 Eliz. C B. Brome v. Car.
- 2. There was a covenant between the parties to levy a fine of lands to T. upon condition, that if he did not pay so much money by such a day, that it should be to the use of C. and his heirs; the sine was levied, and before the day of payment, C. released to T. all his right in the land, and all demands, but afterwards supposing, that the release he made before the condition broken was not a sufficient discharge of the suture use, he brought an ejectment, and at the trial a copy of this release was produced in evidence; and all the Court held, that this release might well be found in this manner, it being to defend the possession. Cro. Eliz. 863. pl. 41. Mich. 43 & 44 Eliz. C. B. Broom v. Car.

3. If parties have matter of evidence by records of this Court, they ought to produce the records themselves; copies of them are not allowable; ruled per Curiam in the Exchequer. Lane 97.

Hill. 8 Jac. Smith v. Jennings.

4. This Court ordered copies of depolitions and other records to be recorded and used, and to be authentic, and this was with the assistance of the judges. Chanc. Rep. 15. 2 Car. 1. Ki- [ 98 ] naston v. the Earl of Darby.

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A copy is 5. A copy of a deed is good evidence, where the defendant not to be admitted as evidence, Mich. 1633. 208.

but where it appears, that the party producing it could not produce the original. 10 Mod. 74. Hill. 10 Ann. B. R. the Queen v. Sutton. — Fin. R. 302. The same as to a deed, to lead the uses of a fine, and decreed a copy to be good evidence at law, and in equity against desendant, his heirs, and assigns, and all claiming under him, or his father, since the year 1653, that his Father sold the lands, and passed the fine to the plaintiff. Norwith v. Sanders.

6. Where the defendant has the deed in his own hands, which concerns the land in question, and will not produce it, in such case, the copy thereof shall be permitted to be given in evidence, and so it was, and the plaintiff swore, it was once in his hand, and this was a true copy of the deed, and himself did examine it. Clayt. 15. pl. 24. Mar. 1633. before Vernon Judge of Assis. Anon.

8. Plaintiff having only a copy of a deed of feoffment, under which she claimed, the original being lost, and the defendant having a counterpart, the plaintiff prayed the copy might be compared with the counterpart, and if it agreed, that the same might be allowed in pleading as a good deed, sealed and delivered, referred to a Master to settle the same. N. Ch. R. 82.

13 Car. 2. Griffin v. Boynton.

9. Plaintiff claimed lands by a will, which was proved, the original was taken out of the Prerogative Office; decreed that the copy of the probate of the will out of the register's book in the Prerogative Office should be admitted in evidence at law at any trial, which should be had concerning the title of the said lands, as the true original will. N. Ch. R. 82. 13 Car. 2. Georges v. Foster.

10. Copy of a deed pretended to be had from the defendant's counsel without seeing the very deed, or comparing it with the copy not allowed. 1 Mod. 94. pl. 3. Pasch. 24 Car. 2. B. R. Lord

Peterborough v. Mordant.

11. He that takes out a copy of part of a record must at least take out so much as concerns the matter in question, or else the Court will not permit it to be read. T. per Pais, 166. 3d edition.

12. A copy of a record is not true, unless it be transcribed in the same language, and therefore a translation shall not be given in evidence, as where a record is in Latin, and the copy in English.

T. per Pais, 228. 3d edition.

13. Part of a long patent was copied out, and sworn true, and it was so much of it as did concern the thing in question, and the counsel of the other part did oppose this to be evidence, and the judge did in the end reject its being shewn by parcels; for that there may be provise's, &c. in the patent, and the witness could not swear he did read the roll throughout of this patent, so that no more was in it than now shewed. Quod nota, if he could, it seems it had been admitted. Clayt. 142. pl. 259. March 1650. Nelthrop v. Johnson.

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15. A copy of a record in the lord's house would not be admitted to be given in evidence at Langhorn's trial, cites Lang.

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17. In evidence to a jury, the recovery was proved by copy of the roll under the sleward's hand, the roll being lost 3 Car. but without proof there was fuch a roll, the Court refused to allow it, although possession had gone along with it according to the recovery; and although this be copyhold, whereof the rolls are not in the custody of the party, but of the lord, and no records but all [ 99 ] done at one Court, and the copy found but of late, without other concurrent evidence of a Court then held; but per Cur. fuch a copy would be good evidence of the copyholders estate, but not of such a recovery being a judicial act, but this recovery being recited in a roll of Court within four years after, the Court admitted it. 1 Keble 567. pl. 14. Mich. 15 Car. 2. B. R. Snow v. Cutler and Stanley.

18. A copy of the counterpart of a lease, the original lease being lost, was given and allowed in evidence. T. per Pais, 292. cites

Mich. 15 Car. 2. Strode v. Dr. Holt. B. R.

19. A printed copy of an act of parliament is not to be given in Acopy of an evidence if not examined by the rolls, and sworn to be a true copy. liament is Try. per Pais, 232.

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act had been before allowed of, and so made a record of this Court, for otherwise nothing shall be allowed of as a sufficient evidence of the act, but the exemplification of it under the Great Seal; and the reason is, because the Court is party which cannot pray over as the party may, so the Court would be in a worfe condition than a common person, if they were to receive for evidence a copy offered. Arg. cites 35 H. 6. 14. and this was allowed to be fo. Per Cur. 10 Mod. 126. Hill. 11 Ann. B. R. University of Cambridge's Case.

20. The copy of a private act of parliament may be given in evidence. Try. per Pais, 226. and in marg. cites Mich. 1650.

Coram Roll at Guildhall, Littleton v. Poins.

21. Copy of a lease which the lord had in his hands, whereby the tenant had power to make leases, is good evidence without swearing it a true copy; cited by Windham, Keb. 720. pl. 50. Pafch. 16 Car. 2. B. R. in the Case of Lee v. Boothby, as the Case of Sir John Rogers.

22. So is copy of Court-roll under the fleward's hand, who was counsel for the lord plaintiff, and was admitted good for the copy-holder; but contra of short notes by way of breviat, which

the Court agreed. Ibid.

23. If upon evidence it be proved that the adverse party has the deed, the Court will admit copies to be given in evidence. Mod.

266. Trin. 29 Car. 2. C. B. in Case of Basset v. Basset.

24. A sworn copy of a record may be given in evidence, but the furest way is to have it exemplified under the Great Seal, or at least the seal of the Court. 10 Rep. 92. 8. Hill. 8 Jac. in Leyfield's Cafe.

25. Copies of Court-rolls examined by the steward allowed to be good evidence in ejectment, without bringing the rolls themfelves into Court. Cumb. 138. Mich. 1 W. & M. in B. R. 26. Copy

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Rep. 54. Hoe v. Na.

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C. accordingly, and

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nal is good evidence.

26. Copy of an original is evidence wherever the original is evidence, if proved a true copy; but the copy of the probate of a will is no evidence, because that is but a copy of a copy. Per Holt. Cumb. 337. Trin. 7 W. 3. B. R. The King v. Haines.

27. Copy of hort note of a judgment in an inferior Court allowed by Hale at Huntington affifes as good evidence, though the judgment was not entered upon record. Per Holt. Cumb. 337.

Trin. 7 W. 3 B. R The King v. Haines.

28: Copies of Court-rolls, or proceedings in Ecclefiastical Courts, &c. are good evidence; it is usual for inferior Courts not to draw up their records, but only short notes, and copies of those short notes being public things are good evidence, otherwise of private things; for copies of rent-rolls are no evidence, but the original must be produced. Per Holt Ch. J. Cumb. 337. Trin. 7 W. 3.

B. R. The King v. Haines.

29. The question being proposed in this case to the Justices of C. B. whether the copy of a bank-bill remaining upon the file in the bank of England was good evidence or not? they all agreed that it was, and that it was like the copy of an inrollment of a parish-register, the bank being a public body established by act of parliament for public purposes. 3 Salk. 155. pl. 8. Pasch.

o Will. 3. Man v Cary.

30. In this case it was held per Holt Ch. J. that the copy of a probate of a will is good evidence where the will itself is of chattels; for there the probate is an original taken by authority, and of a public nature; otherwise, where the will is of things in the realty, because in such case the Ecclesiastical Courts have no authority to take probates, therefore such probate is but a copy, and a copy of it is no more than a copy of a copy. 3 Salk. 154. pl. 7. Hill. of an origi-. 8 Will. 3. B. R. Hoe v. Nelthrope.

where the original is good evidence, and therefore the copy of a church-register, the copies of townbooks, of proceedings in Courts Baron, of proceedings in the Ecclefiaftical Courts and Admiralty

Courts, is good evidence.

21. The plaintiff being a purchasor prays writings and a partition, the defendant infifted there was an entail; the Court gave the plaintiff a year to try the title. In ejectment a copy of the deed of entail was produced, but the original was loft, and not proved to be executed, and so verdict for the plaintiff. On the coming on of the cause on the equity reserved, the desendant infifted that he ought not to be bound by one trial in a matter of right of inheritance; fed non allocatur, being a decree only for a partition. Tamen quære. Trin. 1691. 2 Vern. R. 232. Bliman v. Brown.

32. In an action for work done, &c. the plaintiff gave in evidence, to charge the defendant, a copy of a bill delivered to the defendant, and copied by the order of the defendant, and diverse exceptions were taken by the defendant to the bill, scil. First, the quantity of the work done, and the others were marks against diverse parcels, scil. O. and N. intending by it that these parcels

were wrought for others, and not for the defendant, and other exceptions there were to the price, and he ordered the fervant to indorse upon the backfide the exceptions to the quantity and price, but to omit the marks O. and N. and it was ruled by Holt Ch. J. upon evidence, first, That this copy of a bill delivered was evidence, as a copy of the bill, and not a copy of a copy, and the bill delivered is an original, as well as the books. 2dly, That the acceptance of a bill delivered without objection but to some particulars, is an admittance of the residue to be true. 3dly, The ordering a copy of the bill indorfed ut fupra, omitting the marks O. and N. and the copy with the exceptions being ordered to be delivered to the plaintiff, it is a waiving of the exceptions fignified by those marks. 4thly, Though it was objected that this evidence is a confession, and therefore it ought to be taken together; yet per Holt Ch. J. they are not part of a confession (which ought to be of the fame thing) but a cavil or objection as to the price or quantity, &c. Skin. 672. Mich. 8 W. 3. B. R. Worral v. Holder.

33. Copy of a will examined at the Prerogative-office allowed This is but in evidence, though it is but a copy of a copy, for the entry in the therefore it entry-books is the original quoad hoc (otherwise to make title to ought to be lands by devise) to shew who is executor. Cumb. 248. Pasch. produced,

6 W. & M. in B. R. Smart v. Williams.

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not suffice; but a copy of a probate of a will where the Court has jurisdiction is good, because the probate itself in such case is an original act of the Court. Skin. 584. Trin. 7 W. 3. B. R. in Case of the King v. Haines.

34. Though an old manuscript found among the evidences of a [ 101 ] family may be evidence, because an original, yet a copy would not, because it is liable to the mistake of the transcriber; per Holt Ch. J. Skin. 623. pl. 17. Mich. 7 W. 3. B. R. in Cafe of Steyner and the Burgesses of Droitwitch.

35. On evidence the Court faid, that a copy of a Court-roll of a manor is good evidence; for where the original is evidence, there a copy is; copy of a probate is good evidence. 12 Mod. 24. Pasch. 4 W. & M. Trial on the Custom of the Manor of

Bray. 36. The copy of a town-clerk's book was not allowed evidence to charge a man in a criminal matter. Skin. 584. Trin. 7 W. 3. B. R. The King v. Haines.

37. Copy of a record is good, because one cannot have the record itself; but a copy of a copy is not. Arg. 12 Mod. 500. Pasch. 13 W. 3. in Case of Dillon v. Crawley.

38. Copy of a bill in Chancery taken from the file with Six

Clerk's evidence. 12 Mod. 565. Mich. 13 W. 3. Anon.

39. Note, a copy of a charter under the Great Seal cannot be given in evidence, but a copy of the record thereof may. 12 Mod. 579. Mich. 13 W. 3. Anon.

40. Copy of a will examined at the Prerogotive-office is not to be allowed as evidence to make title to lands by devife, yet where it concerned only a mortgage term it was allowed (though it was opposed opposed as being only a copy of a copy); for the entry in their ecclefiaftical books is the original, quoad boc. Comb. 248. Pasch. 5 W. & M. in B. R. Smart v. Williams,

41. Wherever an original is of a public nature, and would be evidence if produced, an immediate fworn copy thereof will be evidence; per Holt Ch. J. 3 Salk. 154. pl. 6. Linch v. Clerk.

42. As the copy of a bargain and fale, or of a deed inrolled of a

church register, &c. Ibid.

43. But where an original is of a private nature, a copy is not

evidence, unless the original be burnt or lost. Ibid.

44. A copy of an entry in the books of the Office of Franchises was disallowed to be evidence, wherefore the book itself was produced. Ld. Raym. Rep. 745. ruled by Treby Ch. J. at Guild-

hall. Pasch. 10 W. 3. Selby v. Harris.

45. It was ruled by Holt Ch. J. in B. R. Mich. 10 W. 3. that if a man destroys a thing that is designed to be evidence against himself, a small matter will supply it; and therefore the defendant having tore his own note figned by him, a copy fworn was admitted to be good evidence to prove it. Ld. Raym. Rep. 731. Anon.

46. A copy of a fine or recovery is good evidence, so as it be fworn to be a true copy, and examined; per Holt Ch. J. 3 Salk.

154. pl. 6. Hill. 8 W. 3. B. R. Lynch v. Clarke.

47. That wherever an original is of a public nature, and would be evidence, if produced, an immediate sworn copy thereof will be evidence, as the copy of a bargain and fale, of a deed inrolled, of a church-register, &c. but where an original is of a private nature, a copy is not evidence, unless the original is lost or burnt; per Holt Ch. J. 3 Salk. 154, pl. 6. Hill. 8 W. 3, B. R. Lynch v. Clarke.

Show. 397. S. C. adjudged pro Rege.

48. Copies of affidavits proved to be examined by the originals on the file, and produced in evidence was allowed (these ashdavits taken before commissioners in the county). It was objected, that this was no evidence, unless the commissioner who gave the oath was present to prove that the defendants were the same persons who made affidavits before him, fed non allocatur; coram Justice Eyre in Oxford Circuit, and adjourned to B. R. pro opinione; [ 102 ] Pasch. 4 W. & M. on indictment of perjury; and per tot. Curiam, the copies are fufficient evidence. Carth. 220. the King

v. James.

49. A copy of an original is evidence wherefoever the original is evidence, i. e. if proved a true copy; but the copy of the probate of a will in the Ecclesiastical Court is no evidence, because that is but a copy of a copy. Hale at Huntingdon Affises allowed a copy of a short note of a judgment in an inferior Court as good evidence, though the judgment was not entered upon record. Matters of evidence arise from constant usage, as well as from what is strictly legal; copies of Court-rolls, or proceedings in Ecclefiastical Courts, &c. are good evidence; we know it is usual for inferior Courts not to draw up their records, but only short notes, and

copies of these short notes being public things are good evidence; but otherwise of private things, for copies of rent-rolls are no evidence, but the original must be produced. Comb. 337. Trin. 7 W. 3. B. R. the King v. Hains, Alderman of Worcester.

50. In a trial at bar concerning a lease, and when the same was to take effect in possession, a copy of a survey taken in the late times in 1647, by virtue of a commission granted by the powers then in being was admitted as evidence; and was then said; that those surveys were taken with great care, and had been often admitted in evidence; but the reason why the copy was admitted here was, because it was proved that the original was removed from Gurney-house to St. Faith's under St. Paul's, and were there burnt in the great fire; and Northy shewed me a Case in Mich. 25 Car. 2. B. R. between Berry and Halsted, where such a survey was admitted in evidence, by Hale Ch. J. Freem. Rep. 509. pl. 684. Mich. 1699. Underhill v. Durham.

51. Holt Ch. J. faid, that at Huntingdon before Hale Ch. J. the book of a town clerk was read; and if the book may be read, a copy of the book may be read, for in all cases where the original is evidence, the copy is evidence; but if the original be a copy, there a copy of such original may not be read, as a proof for probate of a will of land. Skin. 584. Trin 7 W. 3. B. R. in Case of the

King v. Hains.

52. A copy of the book at Doctors Commons was produced in evidence to prove such a one to be executor; it was objected, that it was no evidence, because it was but a copy of a copy, and the book ought to be produced, or the will with the probate, or a copy of the probate, non allocatur; for per Cur. it being a will of goods, the act of the Court is the original, and the will is proved by the act of the Court before that it is under the seal with the probate, and so a copy of the act of the Court is sufficient; but if it was a will for lands, there a copy would not be sufficient; but they ought to have the entry, and book itself there; per Holt Ch. J. Skin. 431. Pasch. 6 W. & M. B. R. cites it as in a trial

at bar the same term in Andrew Newport's Case.

53. Mich. 8 W. 3. C. B. In ejectment, a motion was made for a new trial, because the party against whom the verdict was given, produced in evidence a fine, and the copy of the inrollment of a deed, which led the uses of it; and Rokeby J. before whom it was tried, refused to admit this copy of the inrollment to be evidence; and resolved in C. B. that such copy is evidence, prima sacie, but the party shall not be estopped by it, as by the record, but may controvert it, as forged, &c. because inrollment at common law, and that for some purpose; and they relied upon Mr. Kendal's Case. (See it now reported, 3 Lev. 387.) And of this opinion Powell J. was generally; but Treby Ch. J. doubted, whether such evidence generally speaking was evidence; but here he agreed with the other Justices, viz. Powel and Nevil; because it was only to lead the uses of the fine, which might be

done by parol. Ld. Raym. Rep. 746. 10 W. 3. Taylor v.

Jones.

103 Equ. Abr. 2:8. pl. 6. S. C.

54. Copy of a note given by A. to B. which being left with C. the copy was taken by C. who is fince dead .- According to the copy it feems, that under the note, the defendant B. had subscribed an acknowledgment, that nothing was really due; this though not proved to be a true copy (C. being dead, and the note in the hands of B.) and though B. had fworn in his answer, that there was no fuch acknowledgment subscribed, was allowed to be heard as evidence being the hand-writing of C. and on producing the note which was on stampt paper, it appeared that the bottom was torn off; per Cowper Ch. 2 Vern. 603. pl. 541. Hill. 1707.

Winne v. Lloyd.

55. A deed made by Robert Spencer and Elizabeth his wife to declare the uses of a fine levied by them of the wife's inheritance being loft, but having been inrolled for safe custody, upon the first hearing of these causes, it being objected, that the conveyance was not a bargain and fale, and fo did not operate by the inrollment; and that therefore the copy of the inrollment not to be allowed as evidence; and the Court feemed to be of that opinion. But an iffue at law being directed to try whether the deed to lead the uses of the fine was duly executed by Mr. Spencer and his wife, the Ld. Ch. J. allowed the copy of the inrollment to be given in evidence, and a scrivener also who drew the deed being examined, a verdict passed for the plaintists, that the deed was duly executed. 2 Vern. 591. pl. 529. Mich. 1707. Combs v. Dowell, and Squire v. Dowell.

56. A copy of a roll of Court figned by the officer of the Court is no evidence in any other Court, unless the Judge of the Court fet his hand to it himself, but at Nisi Prius the hand of the officer is enough because it is the same Court. 10 Mod. 109.

Hill. 1 Ann. B. R. Stennil v. Brown.

57. Warrant to a constable to distrain goods by virtue of an act of parliament; he makes a diffress and returns the goods to the offender but keeps the warrant. Resolved that a copy of the warrant in this case will be good evidence. 6 Mod. 83. Mich. 2 Ann. B. R. Morley v. Staker.

58. The copy of the writ, and the return thereof into the Crown-office is evidence enough of the false return of a mandamus to be the mayor's. 6 Mod. 152. Pasch. 3 Ann. B. R. Queen

v. Chapman Mayor of Bath.

59. A copy of a deed leading the uses of a fine, and enrolled for 2 Vern. pl. 529. Mich. 1707. fafe cuffody only, allowed to be read as evidence at a trial at law. 2 Vern. R. 471. pl. 429. Mich. 1704. Combes v. Spencer. Combes v.

feems to be S. C. A scrivener who drew the deed, being examined, a verdict passed for the plaintiff that the deed was duly executed .-

> 63. A copy of the record of a deed enrolled may be given in evidence against the party acknowledging it as well as any other copy

of a record, but it shall not be good against a stranger; per Holt Ch. J. and Powell. Mich. 5 Ann. B. R. 3 Lev. 387, 388.

64. On trespass at the house of the warden of the Fleet, to prove the possession not in the plaintist, a copy of an inquisition finding a forfeiture of the office, with a judgment thereon of seizure

was produced, fed non allocatur. Trin. 9 Ann. B. R.

65. A copy of a rule of Court signed by the officer of the Court is no evidence in any other Court, unless the Judge of the Court set his hand to it himself; but at Nisi Prius the hand of the officer is enough, because it is the same Court. 10 Mod. 109. Mich. 11 Ann. B. R. at Nisi Prius, Guildhall, London, in Case of Stennil v. Brown.

66. The copy of a revocation of the deputation of an office was of- [ 104 ] fered in evidence of the revocation, but not allowed, because it did not appear but the original might be produced. 10 Mod. 74. Hill.

10 Ann. B. R. Queen v. Sutton.

67. A copy of the condemnation of a ship in the Admiralty Court of France was refused as evidence, for want of an exemplification under the seal of the Court. 10 Mod. 108. Hill. 11 Ann. B. R.

Stennil v. Brown.

- 68. Motion was made that a justice of peace might produce on a trial on an indictment for subornation of perjury an examination taken before a justice of peace from a woman, who at the folicitation and by procurement of the defendant, had charged fuch an one with being the father of a bastard child; the woman had been convicted of perjury; and per Cur. a copy of the examination is no evidence, because it deprives the party of controverting whether it were his hand fubscribed to it or not, and therefore the original ought to be shewn, and so it is in all cases where written evidence is produced which is grounded upon being under a man's hand; and a rule was made, that the justice product facial the examination at the trial, and the party to have copies in the mean while. It was faid, that the reason of allowing copies of the Bank or East-India books was because the hand-writing must be proved; and Fortescue J. added, that in an indistment for perjury, in an affidavit the original ought to be produced, though he faid there had been some question about this matter, and a copy was not sufficient. Mich. 5 Geo. B. R. The King v. Smith.
- 69. 8 Geo. cap. 25. feet. 2. Copies of recognizance, in nature of flatute staple, signed by the clerk or his deputy, if original lost, good evidence.

[A. b. 27] Counterparts.

1. Y. Covenants with C. to make an affurance of Blackacre before Easter by indenture. Y. dies, the covenant not performed, and the very original deed comes into the hands of the executor of Y. and C. brought a writ of covenant on the counterpart, and it was said by the Court, that it does not lie without the deed itself; per Walmsly, he may have an action of detinue to recover the deed. Noy. 53. Yelverton v. Cornwallis.

2. In

2 Salk. 153. pl. 1. S. P.

2. In ejectment, title was under a long term, but the original leafe could not be produced, but being an antient leafe, the grandfon of the leffor produced a counterpart found among the other writings of his grandfather, and this was allowed for evidence, though no witnesses were subscribed to it; and Windham J. said, that he had feen many deeds in the time of Queen Elizabeth with-1 Lev. 25. Pasch. 13 Car. 2. B. R. Garret out witnesses. v. Lifter.

6 Mod. 225. S. C. cited by Holt Ch. J. as the Case of Mayo v. Comb.

3. Per Holt Ch. J. In a Case in my I.d. Hale's time between Comb and Mayo, a counterpart of an antient deed was admitted as evidence of the deeds, and the special verdict was drawn up, as finding the deed with a prout patet by the counterpart, which he faid was done to preferve the precedents; and now by all the Court, the counterpart of a deed without other circumstances is not sufficient evidence, unless in case of a fine, in which case a counterpart is good evidence of itself. Salk. 287. pl. 23. Mich. 3 Ann. B. R. Anon.

4. Trin. 9 Ann. C. B. Sr. Wm. Pole's Case, arguendo. In order to induce the Court to read the counterpart of a deed where the original could not be produced, it was faid there ought to be good reason shewn to the Court, as 1st, That the deed is lost; 2dly, That it is in the adversaries hands; 3dly, That the possession was gone according to the deed, and if possession has not gone accord-[ 105 ] ing to the deed, there ought to be a very good account given why it did not; the Court C. B. was divided in their opinion. There was now a bill of exceptions and writ of error brought in B. R, but no judgment was there given, the cause being agreed.

# [A. b. 28] Court-Rolls.

4 Leo. 217. pl 348. S. C. & S. P. ingly.

1. As to the time of a surrender made, or Court held, the rolls of the manor are no concluding evidence; but shall be tried by beldaccord- the country. Le. 289, 290. pl. 395. Trin. 26 Eliz. B. R. Burgets v. Foster.

2. To maintain customary descents the Court enforced the parties which maintained the custom to shew precedents in the Courtrells to prove the usage; and Coke Ch. J. said, without such proof, that it had been put in use, though it had been deemed and reported to have been the true custom, yet the Court could not give credit to the proof by witnesses. 4 Le. 242. pl. 395. Pasch. 8 Jac. C. B. Ratcliff v. Chaplin.

3. If proof be to be made of a particular benefit, which the lord of the manor is to have, no better proof can be of this than by the rolls of the Court; for no proof can be more directly and particular than by fetting down of all the rolls in certain; per Whitlock J. per Doderidge J. the lord ought to shew that the rent or heriott, &c. was paid; for the steward may put in what he will, 325, ut ante; afterwards judgment was for the lord. 3 Bulft. 324. Hill. 1 Car. B. R. Hungerford v. Haviland.

4. Proclamations whereby the lord claims forfeiture of a copyhold Lev. 62. S. ought to be proved viva voce, and not by the Court-rolls only; C. but S. P. does not apheld in evidence to a jury. Keb. 287. pl. 98. Pafch. 14 Car. 2. pear.

B. R. Pateson v. Danges, alias Ld. Salisbury's Case.

5. On traverse of tenure by suit of Court-rent of 16 s. and relief in replevin; as evidence of the relief, feveral antient rolls tempore H. 8. and E. 6. and Eliz. and Jac. 1: were produced shewing relief due for the eftate in question, and also for other estates; also old accounts of bailiffs of the manor in which reliefs were mentioned; also there was parol proof, the rent and suit of Court, and verdict pro domino manerii; for in case of heriots, Justice Levinz allowed of fuch antient memorials, though no evidence could be given of any modern payment; that till the time of Queen Elizabeth these rolls were kept regularly and well by counsel, but fince this time they were drawn up by attornies and others not skilled in the law, and so were not of that \* great authority as \* Lit. S. formerly; that a relief was incident to a tenure of socage + | by 126, 127. rent and fealty, and upon death of the tenant the heir ought to pay + No relief double the rent; that seisin of the rent was seisin of the featty, and where te-Jeisin of fealty was seisin of all manner of services; that the statute nure is by of Car. 2. had abolished the slavish part of the tenures, but had Co. Litt. 93. preferved and established all duties relating to them; that he S. 142. would not presume the relief or other servicee had been released; | But if tethat though the prescription here was to hold a Court-Leet and corporal fer-Court-Baron every year within a month after Michaelmas and vice, or la-Easter, and Court-Barons ought to be held oftner, and are not bour, or tied down to this rule by any statute, yet of late years they have lief is due, usually been held together, and as it is the general practice, it is but contra well enough. Mr. Hele's Case, Lord of the Manor of King's- of yearly Nympton, coram Baron Price, at Lent, Devon. 1717, 1718. fits which

may be de-

livered or paid, the lord may diffrain immediately; yet if tenure be by a rofe, lord cannot dirtrain till roles by courfe of year may have growth.

## [A. b. 29] Decrees.

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1. A decree of Chancery, or other Court of equity is not any evidence in a Court of common law, as in Walfingham's Cafe. Agreed per Curiam. 2 Sid. 75. Pasch. 1658. B. R. in Case of Marret v. Sly.

2. A decretal order under feal, which writes all the proceedings on exemplification under the Great Seal, hath been allowed to be read; per Twisden, but per Allen contra, not unless it hath the bill and answer, which Windham agreed; but by Twisden, where the decree is produced only in paper then the bill and anfwer ought to be adjoined, but not so when the decree is under feal; and in C. B. Stiffe v. Stiffe, the judges admitted a decree to have been under feal, and yet would not allow it without bill and answer; and by Allen it is usual to disallow such decrees, but an

exemplification in Chancery, per Curiam always recites the bill

and answer. Moreton Serjeant said he never did see the seal of any Court denied to be given in evidence. Keb. 21. pl. 62. Pasch. 13 Car. 2. B. R. Trowell v. Castle.

[A. b. 30] Deeds; though the Witnesses not proved dead or be-

1. Where affife is adjourned for difficulty, and the plaintiff shews deed which he gave in evidence, the Court shall not regard it if the deed he not entered of record; for we adjudge only of that which is sent to us of record, and we cannot know if it was given in evidence or not if it does not come to us of record. Br. General Issue, pl. 35. cites 18 Ass. 3.

2. Cancelled deeds allowed in evidence after proof of the ill practice how they came to be cancelled. Het. 138. Hill. 4 Car. C. B.

Beckrow's Cafe.

Palm. 403.
3. Seals broken off from a deed to lead the uses of a recovery, subfequent, yet being proved it was done by a little boy, and that
the seals were once annexed, and the razures of the parts
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Tagreed upon examination, it was admitted to guide the uses.

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Clerke v. Heath.—

4. The defendant produced a deed under the plaintiff's hand and feal, whereto were witnesses; but because they did not prove the witnesses dead, nor that they were gone to sea, though they alledged it, it was not permitted at first to be given in evidence; but afterwards, upon proof that it was read at a former trial, it was suffered to be read. Freem. Rep. 84. pl. 103. Pasch. 1673. Phillips v. Crawly.

5. Twisden said he had seen administration given in evidence after the seal was broke off, and so wills and deeds. I Mod. 11. pl. 34. Mich. 21 Car. 2. B. R. in Case of Clerk v. Heath.

6. Certificate of a bifloop that has but a small bit of wax upon it, may be read as evidence that A. had taken the oath according to the Uniformity Act. Per Twisden J. and not objected to. Mod. 11. pl. 34. Mich. 21 Car. 2. B. R. Clerk v. Heath.

7. It was faid, that where there is a common-feal put to a deed, that is title enough of itself, without witness to prove it, or that the major part of the college be agreed; and if it was said that it was put to by the hand of a stranger, that shall be proved on the side that says so. Skin. 2. pl. 2. Mich. 33 Car. 2. B. R. Ld. Brounker v. Sir Robert Atkins.

[ 107 ] 8. Upon a trial at bar the plaintiff made title by an act of parliament 16 & 17 Car. 2. the defendant's defence was upon a provision in that act, which faved all rights to the King, and estates before 1639. made with power of revocation, by Sir Robert Carr the sather, and then not actually revoked. The desendant would have fet up a settlement made before that time, and proved it sealed and delivered before that time, and to prove that it was not actually

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fame p the ju witner 326. p tually revoked by Sir Robert Carr, offered an abstract of the deed, and a case made upon it, with an opinion, all under the hand of Mr. Justice Ellis, with the depositions of Mr. Justice Ellis in Chancery in a Case between Sir Robert Carr the son and his mother; wherein it appears to be a deed in force after Sir Robert Carr's death, though not cancelled and cut in pieces; yet the Court refused it as evidence, and would not allow the deed to be read. Skin. 205. pl. 2. Mich. 36 Car. 2. B. R. Scroop v. Carr.

9. Deeds not stamped will not be allowed to be given in evidence. Vid. the Stamp Acts, 5 & 6 W. & M. cap. 21.

10. A deed of bargain and fale acknowledged by the bargainee, This deed and inrolled, by which a term for years was affigned, was given in fome years evidence without any proof made of the bargainer's fealing and after the delivery thereof, and after debate it was allowed, per Holt Ch. J. date, and it and Eyre J. and tot. Cur. For the acknowledgment of the party that the in a Court of record, or before a Master Extraordinary in the land pasted country (as this was) is good evidence of its being fealed and de- by the deed livered, and fuch an acknowledgment estops a man from plead-the inrolling non est factum. Also inrollments of deeds on the statute ment, being are admitted every day in evidence, without witnesses of the seal- of a term ing and delivery; and it is the acknowledgment which gives it was in cafe credit, and not its operation or contents. I Salk. 280. pl. 7. of a bargain, Pasch. 6 W. & M. in B. R. Smart v. Williams.

and fale of lands in fee,

the estate passes by the inrollment, and cited C. L. 225. b. that the inrollment is no evidence. But Holt Ch. J. faid that how strong the evidence is must be left to the jury, but is evidence. For in case of inrollment where land paffes, it cannot be a proof of the deed by the help of the statute, but by the common law; and that there was an inrollment at common law, and that in case of a bond inrolled the party is estopped to plead non est factum, and that though the bare inrollment is not evidence, yet the acknowledgment is evidence of as high a nature as a recognizance to this purpose. Comb. 247. &c. Smart v. Williams .- 3 Lev. 387. S. C .-

11. Also they held a sworn copy of a deed inrolled, good evidence. I Salk. 281. ibid.

12. Counterpart of antient deeds lost good evidence with other circumstances, but not of itself, but of a deed leading the uses of a fine, it is good evidence of itself. 6 Mod. 225. Mich. 3 Ann. B. R.

## [A. b. 31] Depositions.

1. Manlye has taken oath; the deposition of witnesses examined on the behalf of the plainant, and remaining in this Court, are to be given in evidence at a Court-Baron holden at Potton in the county of Bedford on Monday next, therefore publication is granted. Cary 50. 5 & 6 Ph. & Mary. Manlye v. Simcote.

2. If the party cannot find a witness, then he is as it were dead to him, and his deposition in an English Court in a cause between the fame parties plaintiff and defendant may be allowed to be read to the jury, fo as the party make oath he did his endeavour to find his witness, but that he could not see him, nor hear of him. Godb. 326. pl. 418. Pasch. 21 Jac. B. R. Anon.

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4. Process by deposition taken here in a former suit shall be allowed in this, notwithstanding all the parties be alive. Cited by Tansield J. Lane. 100. in Pasch. 8 Jac. in the Exchequer, in Gooche's Case.

5. Upon an evidence in an ejectione firma betwixt the plaintist and defendant, the Court would not suffer depositions of witnesses taken in the Court of Chancery or Exchequer to be given in evidence, unless affidavit be made that the witnesses who deposed were dead. Godb. 193. pl. 276. Trin. 10 Jac. in C. B. Sir Francis Fortescue v. Cooke.

6. In evidence given to a jury, Hutton faid, that testimony examined in a Court which is not of record, as in the Spiritual Court, though it be in a cause of which they have jurisdiction, yet it shall not be read here; but the other three justices e contra, and they all agreed, that depositions taken in the Council of York or Marches of Wales shall not be received here; but afterwards they agreed with Hutton in that case, because it never was used to be done, and they would not make this a precedent. Litt. Rep. 167.

Mich. 4 Car. C. B. Anon.
7. Depositions taken in the dutchy, and exemplified, were offered in evidence and rejected, because the answer of the defendant was not also exemplified, so that it may appear to be the same matter and title; so that it seems they might then have been allowed. Clayt. 9. pl. 17. Mar. 8 Car. before Damport Ch. B.

Judge of Ashfe. Albroke's Case.

8. A witness examined for the plaintist, and to be cross-examined for the desendant, but before he could be cross-examined died, yet this Court ordered his depositions to stand. Chanc. Rep. 90. 10 Car. 1. Lord Arundell v. Arundell.

9. Depositions in Ecclestastical Court not allowed because not a Court of record. March. 120. pl. 198. Mich. 17 Car. And it was held, per two justices contra one, not allowable, though the parties affent to the allowance.

10. Depositions taken in the Ecclesiastical Court, cannot be given in evidence at a trial at law, because not taken in a Court of record, though the party that deposed it is dead; Crawley held, that by consent they might; Foster and Reeves contra, yet admitted that depositions taken in a Court of record might be given in evidence. March. 120. 1 Cro. 396. pl. 198. Mich. 17 Car. Anon.

10. A person subprenaed to give evidence at a trial did not appear, but it being sworn that he came part of his journey, and fell sick upon the road, so that he was not able to travel any farther, his depositions in Chancery, in a suit there between the parties about this matter were admitted to be read. Mod. 283. pl. 29. Trin. 29 Car. 2. B. R. Luttrell v. Reynell & al.

11. Depositions taken in the Court of Wards, are no evidence in B. R. to prove the same title. 2 Roll. R. 312. Pasch. 21 Jac.

B. R. Berisford v. Philipps.

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12. Depositions taken in Chancery in perpetuam rei memoriam But where upon a bill exhibited to prove a will cannot be given in evidence dismissed on a trial at common law, unless there be an answer put in and because it produced. Ellis J. said it has been so resolved several times in prayed re-B. R. and C. B. and it was refolved fo in DUTTON's Cafe, upon being only a trial at bar concerning his will forged by Mr. Colt. Raym. 335. toperpetuate Mich. 31 Car. 2. in Camm. Scacc. cites it as the Case of Bray the testimev. Whitelage.

not to be fet

down for hearing; yet the Master of the Rolls said, that the plaintiff would at law have the benefit of these depositions notwithitanding the dismission of the bill. At the Rolls, 2 Wms's Rep. 162. Trin. 1723. Hall v. Hoddesdon.

15. A bill was dismissed at the hearing for want of equity, yet [ 109 ] the Master of the Rolls said, and allowed the plaintiff to use the depositions in this cause at a trial at law in case of the death of the witnesses, though the bill did not pray to perpetuate the testimony. 3 Chan. R. 22. Hill. 1667. Moyfer v. Peacock.

16. Depositions taken coram non judice, were not allowed to be used at a trial at law. Chanc. Cases, 306. Hill. 29 & 30 Car. 2.

Stork v. Denew.

17. It was ruled, that the examination in Chancery of one between the same parties, and cross-examined there, should be read before the delegates. 2 Chanc. Cases, 250. Hill. 30 & 31 Car. 2.

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18. Ordered upon long debate, that depositions of witnesses taken in a former cause thirty years since, where the same matters were under examination, and in iffue as in this, (the point being concerning incumbrances, and dampnification in both cases) should be made use of in this cause, albeit the plaintiss in this cause, and those under whom he claims were not any parties in the former cause, inasmuch as the tertenants were then parties, and the now plaintiff's title did not then appear, and the witnesses were dead; and precedents were cited for this between TRINITY-HALL AND Doctors-Commons, where Dr. North's depositions taken in a former antient cause, where neither of the now parties were party, was read, and the like between Culton and Vaughan. Chanc. Cafes, 73. Pasch. 18 Car. 2. Terwit v. Gresham.

19. It was faid by Justice Ellys, that it was resolved by the whole Court of B. R, in the Case of Dutton upon a trial at bar, concerning his will forged by Mr. Colt, that depositions taken in Chancery in perpetuam rei memoriam upon a bill for that purpose exhibited, cannot be given in evidence at a trial at law, unless there be an unswer put in and produced; and so he said he has known it several times resolved, both in B. R. and C. B. Raym. 335. Mich. 31 Car. 2. in Scacc. Powlet's Case, cites it as the Case of Dutton

v. Colt.

20. The Ch. J. refused evidence of depositions in Chancery, because no rule was made on the hearing to allow them, but only a subsequent order of Court after dismission, and it appeared not whether they were taken here or beyond sea, nor in English or foreign language, Vol. XII.

but only affidavit, that the witnesses were foreigners, and could not be found; but the Court conceived, if the depositions were according to the course of the Court they ought to be allowed; fed concordatum est inter partes. 1 Keb. 685. pl. 91. Hill. 15 & 16 Car. 2. B. R. Sr. Martin Nowel's Cafe.

21. Depositions taken on a bill of revivor and dismissed, cannot be used on an original bill. 3 Chanc. Rep. 40. Hill. 21 & 22 Car. 2.

Backhouse v. Middleton.

22. Depositions taken de bene esse by order of Court, shall not be admitted, if put in before the defendant has answered, for then they are taken before iffue joined, but in the fame Court they may, thought not in a Court of law; and therefore the course is to procure an order of Chancery requiring the adverse party to admit fuch evidence; yet this does not bind the Courts of common law. 2 Jo. 164. Mich. 33 Car. 2. B. R. in Piercy's Cafe.

23. But otherwise it may be where the defendant has been in contempt for non-appearance, where the bill is brought for preferving testimony seems to be admitted. Mich. 14 Car. 2. in Scacc. Hard.

315. Brown's Cafe.

24. Depositions shall not be used as evidence in a fuit at law, where any of the parties at law were not parties to the fuit in equity, [ 110 ] for being strangers they were not capable of preferring interrogatories or examining fuch witnesses, and therefore fuch strangers shall not be bound by them, and inastituch as they cannot be read against them, no more shall they be read for them. Hard. 472. pl. 1. Hill. 19 & 20 Car. 2. in Scacc. Rushworth v. Countess of Pembroke.

25. Depositions of witnesses taken before the coroner against the aider and affifter to a murder at which he was prefent, and against the person that did it, who were afterwards dead, or unable to travel, were read by the opinion of all the justices, the coroner first making oath, that fuch examinations are the fame he took upon oath, without any addition or alteration whatfoever; not ap- resolved by all the judges. Keling, 55. 18 Car. 2. Ld. Mor-

. ley's Cafe.

26. Upon an indictment for murder, the question at the trial was, whether the depositions of a witness taken before the coroner should be read in evidence against the criminal, it appearing, that the witness was gone beyond sea, and as supposed at the instigation of the offenders; and it was here ruled, that it should be read, for being beyond fea is the same thing as if he was dead; but all (except the chief justice) were of opinion, that a deposition taken before a justice of peace could not be read, but the authority of coroner fuper vifum corporis is very great, and in some cases it is a record, and not travertable. 2 Jo. 53. Trin. 28 Car. 2. B. R. the Case of Thatcher and Waller.

27. Depositions taken in a former cause cannot be read in any 3. other cause with one that does not claim under the party with whom those depositions were taken; but if a legatee brings a bill against the executor, and proves allets, another legatee though

f. v. 180. Broinwich's Cafe. S. C. he d accordingly. -Sid. 277. hat S. P.

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no party may have the benefit of those depositions. Vern. 413. pl. 390. Mich. 1680. Coke v. Fountain.

30. Upon a bill exhibited in Chancery to perpetuate testi- Show. 363, mony, the defendant, who was heir at law, flood in contempt 364. S. C. Gregory and and would not answer, and thereupon the plaintiff had a com- Eyres held mission and examined witnesses to the matter of his bill, de bene it good evieffe, and the defendant joined in commission and cross-examined some of dence. Dol-the witnesses produced for the plaintist, and before the answer carries ben dubitathe witnesses produced for the plaintiff, and before the answer came in vit. and the witnesses died; and upon a trial in ejectment in which the Holt Ch. J. plaintiff made title under this will, the question was, whether hæsitavit, and for that these depositions could be given in evidence, and a verdict was reason, adtaken for the plaintiff, but the postea stayed, till the opinion of jornatur.the Court was had on this point, and it was not questioned, but S. C. and if the defendant had answered, and these depositions had been after much taken after answer, they had been good evidence against the same debate the parties, and those that claim under them; and per Eyre J. it Court was might be very inconvenient if this should not be allowed as evi- that these dence, how otherwise can a devisee examine witnesses in per- depositions petuam rei memoriam? for the heir at law will not answer to might be the plaintiff's bill; and on the other fide, he will not call in dence, oquestion the title of the devisee, as long as he has witnesses alive therwise a to prove the will, but as foon as they are dead, then he will comty to perpemence his fuit. I Salk. 278. pl. 3. Mich. 4 W. & M. in B. R. tuate the Howard v. Tremaine. Per Cur. nothing can make it evidence teftimony but the necessity of the thing: it is true, in cases of wills it may be of winnesses necessary to examine witnesses to perpetuate their testimony, but very little or in this case the plaintiff was nonsuited upon evidence viva voce, no purpose. and afterwards exhibited a bill, and obtained these depositions upon examination of his own witnesses, which is but paper-evidence at the best, and therefore they inclined not to allow it, tamen quære. 4 Mod. 147. S. C.

31. It was infifted upon by the Solicitor General that the de- [ 111 ] positions in Chancery, which were read against the Lord of Bath in the other cause are no evidence in this, because the trial is not between the fame parties, and depositions are never evidence but where they are mutual, and this defendant does not claim under any party to the former fuit; but per Cur. they may be read, because the defendant shelters himself under the others title, and the title of the land is not in question, but to whom the rent shall be paid. If the defendant gives the plaintiff's answer in Chancery in evidence he may infift to read only fuch part as he will; for it is like examination of witnesses; but the other side may infift to have the whole read after. 5 Mod. 9. Mich. 6 W.

& M. E. of Bath v. Batterfea.

32. On a trial on an information for a libel, depositions taken be- Comb. 358. fore a justice of peace relating to the fact the deponent being fince Hill. 8. W. dead, were not allowed in evidence. Per B. R. upon advice with after long the judges of C. B. In cases of felony such depositions before a debate and justice, if the deponent die, may be used in evidence by 1 and conference with the 2 Ph. & M. cap. 13. But this cannot be extended farther than justices of

C. B. by the particular case of selony. I Salk. 281. Hill. 7 W. B. R. Justice Eyre The King v. Pain.

would not allow it to be given in evidence.—Ld. Raym. Rep. 729, 730. S. C. accordingly, and the information was refused to be accepted.—5 Mod 160. S. C. and the Ch. J. declared that it was the opinion of both Courts, that thefe depositions should not be given in evidence, the defendant not being present when they were taken before the mayor, and had loft the benefit of a crofs-examination .-

> 33. To prove a jointure (the jointure deed being loft) depositions in Chancery were produced, and offered to be read (the bill and anfiver being taken off the file and lost) but proposed to prove by the Six Clerks book, that it was once filed, and produced an inrollment of the decree, which mentioned both bill and answer; and the Court held that the deed being loft the proof might be supplied by memorials. 5 Mod. 210. Pasch. 8 W. 3. Barley's Case.

Comb. 474. S. C. but no judglength upon Rep. 222. he'd that

34. An appeal was from the commissioners of excise to the commissioners of appeals upon the statute 12 Car. 2. cap. 23. The question was, whether the depositions of witnesses, and their Mod. 271. examination wrote by the clerk of the commissioners of excise shall be S. C. and at read in evidence upon this appeal, or whether the commissioners further con- of appeals should not re-examine the witnesses viva voce. The fideration, 2 Court (mutata opinione) held that the commissioners ought to exaprohibition mine the svitnesses de novo on the appeal, and that it was the intent 1.d. Raym. of the act, and the commissioners of appeals had authority given for that purpose by the act to administer oaths, and this was just, Parch. 9 W. because the first sentence might be by default, or the depositions might mifrepresent, or not represent the whole case; and that commission- on appeals from orders of justices examination is always de novo; ers of ap- thereupon a prohibition was granted; but Holt Ch. J. faid that the commit his private opinion was, that if the witneffes were dead, they fioners ofex- might use the depositions. 2 Salk. 555. Mich. 8 W. 3. B. R. cife ought Breedon v. Gill.

not to proceed on the former depositions unless the witnesses are dead, &c. l.d. Raym. Rep. 222. Pasch. 9 W. 3. Bree, Bredon v. Gill .-

35. Depositions taken before justices of the peace cannot be read upon appeal to the quarter-fessions, nor can depositions taken before [ 112 ] commissioners of bankrupts be used at trial at common law. Arg. Ld. Raym. Rep. 220. East. 9 Will. 3. in Case of Breedon

> 36. If a witness who is not likely to be had at a trial be examined before a judge and cross-examined by the other party, and his depositions put in writing; yet if at the trial it be proved, that the party might have had him there his depositions are not to be read. Per Cur. 12 Mod. 493. Pafch. 13 W. 3. Anon.

37. If a witness going to sea be by rule of Court examined upon interrogatories before a judge, and the trial comes on before he is gone, his depositions shall not be read, but he must appear, for the rule was made on supposal of his absence. 2 Salk. 691. Pasch. 13 W.3. B.R. Anon. and by confent of the parties. Per Prat Ch. J. 38. These depositions in perpetuam, &c. cannot be made use

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of against any others but the defendants who were subpanaed to defend the matter, or some claiming under them some interest accrued since

the bill preferred. Prac. Reg. 36, 37.

40. It was ruled by Holt Ch. J. at Lent affifes at East-Grimstead, 11 W. 3. 1699. that if an answer to interrogatories in Chancery be given in evidence at a trial, they ought to be proved by the examiner himself to have been the same day that is mentioned upon them. Ld. Raym. Rep. 734. Goring v. Evelin.

41. At Lent affises at Thetford, 12 Will. 3. 1699. Holt Ch. J. refused to admit depositions in Chancery to be given in evidence after the bill was dismissed; but it was referred as a point for his further confideration, and conference had with the practifers in Chancery; he gave his opinion, that notwithstanding fuch dismission of the bill, the depositions were good evidence. And fo he ruled it afterwards at Guildhall at the Sittings after Hillary Term. 1 Ann. Ld. Raym. Rep. 735. Smith v. Veale.

42. Several persons were examined as withesses no ways con- Freemen's cerned in interest, and the cause heard, and issues directed to be Cases in tried, but the trials were not carried on, and the cause slept many 260. years, and after abated; and then those persons who had been 329. examined as witnesses became heirs at law, and thereby interested accordingly. in the matter; the cause was revived and heard, and the same issues directed to be tried; and the persons who had been so examined (being now plaintiffs) prayed to have an order that their depositions taken when they were disinterested might be read as evidence at law for themselves; and my Lord Keeper ordered accordingly, and likened it to the case where one is the only, or only furviving witness to a deed becomes after the party interested, his hand may be proved at law; so if a witness to a deed becomes blind. Then the cause proceeded to trial at bar in C. B. where the whole Court held thefe depositions could not be read without confent, the parties being living; but the defendant confented, and had a verdict for him, and the plaintiff obtained a new trial, and then would have had the fame order; but my Lord Keeper faid, fince the judges had refolved otherwife, he could not take upon him to make that evidence which was not, and therefore only ordered they should be read in evidence, as by law they might. Abr. Equ. Cases, 224. Trin. 1702. Holcraft v. Smith.

43. Depositions were taken in Chancery in perpetuam rei me- 2ld. Raym. moriam, and it happened afterwards that the inheritance of the fame Rep. 1008. land descended to a person who was sworn as a witness, and he was acordingly. now a party to the fuit in ejectment, and upon a question in C. B. whether these depositions could be read, Trevor Ch. J. held they ought; but Tracy and Blencow contra, whereupon Tracy went [ 113 ] to B. R. for the opinion of the Court, and per Cur. they ought not to be read; for the only intent of fuch depositions was to perpetuate testimony in case witnesses died, and they cannot be read in any case between other parties till after the death of the witness who is to appear and give evidence viva voce as long as he

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lives; much less can they be read in this case where the witness himself is a party. 1 Salk. 286. Mich. 2 Ann. Tilly's Case.

Gilb. Equ. Rep. 16. 18. S. C.—

44. The depositions of one in Ireland, or elsewhere out of England, where no process will fetch him may be read as evidence to prove the record, as also in case one be fick, &c. Per Gould and Powel J. it is better to have witnesses viva voce, where they may be had; but suppose the record be out of the Queen's dominions, or in the West-Indies, or in Scotland, a deposition would do in such cases; per Powel J. the law requires the best evidence that can be had, but we cannot compel any one to come out of Ireland, nor oblige any one to go and inform himself in order to be a witness; but the rule is to be interpreted with respect to the persons deposing, as that a man's affidavit shall not be read when he is here to give his evidence viva voce; yet the depositions of those that are absent may be read; per Holt Ch. J. and cited Cro. C. 541. but faid, he would not warrant the authority of the cafe. 11 Mod. 210. pl. 1. Pasch. 8 Ann. B. R. Ld. Altham v. Ld. Anglesey.

45. Depositions in another cause in which the matters in question were not in iffue, cannot be read. MSS. Tab. 1706. Allibone v.

Attorney-General.

46. Regularly the depositions in Chancery of a witness shall not be given in evidence if he be alive, although he be beyond sea, as in Ireland, &c. otherwise if he be in France, or another kingdom not subject to the dominion of our King. Tr. per Pais, 7th

cdit. 385, 386.

47. Depositions in a former cause, where neither plaintiff nor defendant were parties cannot be read as evidence, but depositions in a cause where either plaintiff or defendant were parties may be read as evidence against such plaintiff or defendant. MSS. Tab. January 20th, 1702. Ld. Peterborough v. Germain.—February 25th, 1717. Everard v. Ashton.

# [A.b. 32] Examination.

1. One examined in Admiralty Court, used here at the hearing. Toth. 288. cites 16 Eliz. li. a. fo. 530. Watkins v. Fursland.

2. A witness not to be examined viva voce at the bearing. Toth.

287. cites Wright v. Moor, 6 Car.

3. To examine witnesses upon oath for proof of acquittances, payments, and other disbursements upon bearing. Toth. 287. cites

Comes Kenrie v. Gore. Pasch. 6 Car.

4. Nota pro regula. Examination of witnesses by interrogatories out of the term, by Foster Ch. J. is extrajudicial, and not to be allowed, though the party consent; contrary by Twisden and Windham, consensus (if according to law) tollit errorem; and the Court may as well allow the examination of witnesses before a judge by depositions, as read the assistant of a person absent; this is no more than the law allows. I Keb. 36 pl. 98. Pasch. 13 Car. 2. B. R. Blake v. Page.

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3. The defendant having prepared for a former trial, which the plaintiff delayed, and would not proceed then, but now spurred a trial on again, whereupon the defendant prayed that it might be stayed on suggestion that his material witnesses were mariners, and now going to fea with the fleet, and would not be ready till Mich. term The Court agreed to examine the witnesses by consent of parties before the Ch. J. the trial being to be before him, and that the plaintiff, if he would, might crofs-examine them. 2 Keb.

13. pl. 32. Pafch. 13 Car. 2. B. R. Catline v. Pidgeon.

6. If one witness be examined for the defendant de bene esse to preferve his testimony upon a bill preferred, and before answer, and upon an order in Court for his examination made upon hearing counsel on both fides; and if after answer the witness dies before he is examined again the answer coming in on the 28th of Nov. and the witness's death happening on the 18th of Dec. following, and he being fick all the mean time, fo that he could not go to be examined, the examination of fuch witness shall not be read in evidence, because it was taken before iffue joined in the cause, and he might have been examined after; and the defendant did not appear to be in contempt. Held upon evidence in the Exchequer per Curiam, by advice of all the other judges confulted with thereupon. Hardr. 315. pl. 6. Mich. 14 Car. 2. Browne's Cafe.

7. The witnesses may be examined before a judge by leave of the Court, as well in criminal causes as in civil, where a sufficient reason appears to the Court, as going to sea, &c. and then the other fide may cross examine them. Comb. 63. Mich. 3 Jac. 2. B. R.

Matthews v. Port.

8. In a trial at bar May 14, 1705. of an iffue directed out of Chancery to try if a leafe was made in pursuance of a power which was to make leafes for the best rent that could be got; a witness named Rushley was examined in Chancery concerning the value of the land, having been collector of the rents; and at the time of his examination in Chancery he referred to and confulted his rental. But now at this trial he was become blind, and therefore his examination in Chancery, and depositions there were admitted to be read; because if he had been so ill as that he could not have come to the trial, they had been good evidence, and now he is difabled to confult the rental, by the act of God, and therefore the same reason holds. He also gave evidence of what he remembered besides. 2 Ld. Raym. Rep. 1166. East. 4 Ann. Kinsman v. Crook.

9. Where a supplemental bill is brought after publication in the original cause, it is irregular to examine the witnesses to a matter that was in iffue, and not proved in the original cause, and such proofs are not to be read. March 31st, 1725. MSS. Tab. Bag-

nall v. Bagnall.

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### [A. b. 33] Exemplification. Of what.

1. In affife, he who pleads a recovery in a writ of right in Court-Baron in bar of affife before the justices of affife, ought to shew the record exemplified under the feal of the Chancellor, and otherwise it is no plea, and it ought to be removed into Chancery by recordare, &c. and then to be exemplified. Br. Barr. pl. 95. cites

28 E. 3. and Fitzh. tit. Assise.

2. 3 & 4 Edw. 6. cap. 4. feet. 2. All perfons which shall claim Though a patent was by force of any patents to be made by the King, and all other that shall furrendered, yet before have any estate or interest in any lands, offices, or other things, by or vacat. en- under fuch patentees, may convey unto themselves title, as well tered a con- against the King as against any other person, by shewing forth the [ 115 ] exemplification or constat of the roll, or of so much thereof as shall able, but not ferve for the matters in variance, under the Great Seal; and the after that it exemplification or constat of the inrollment shall be of the same force, on the Roll. as the first letters patent should be, or if the same were pleaded or D. 167. 2. Shewed.

marg. pl. 13. cites it as Sir Robert Sidney's Case, and says that Br. Patents, 97. which cites 32 H. 8. is to

be so intended.—S. C cited accordingly. 3 Le. 249. Mich. 32 Eliz.

R. and W. were patentees of an office. R. in the absence of W. beyond sea surrendered the patent in Chancery, and was cancelled there, and a remembrant thereof indorfed but not inrolled, that they both had furrendered, &c. whereupon a new patent was made by Qu. Mary to a third person, reciting the former furrender as made in the names of both. W. on his return from beyond fea fued to have an exemplification or conftat by the 3 & 4 E. 6. cap. 4. It was much doubted if the patentee himself shall be intended within the purview and benefit of the said statute, because the title and preamble thereof declares the mischief that those who purchase parcel of the lands in the patent contained of the patentee or his heirs, fustain by the furrender or loss of the original patent; but as it feems by that first sentence of the purview the patentees themselves shall be aided. D. 167. a. pl. 12. Hill. I Eliz. Wroth v. Walgrave. S. C. cited per Cur. 5 Rep. 53. a. as refolved that these words, " all and every patentee and patentees, &c." is a distinct clause of itself, and extends to all letters patents whatfoever, either concerning lands, &c. or perfons, &c. or any thing or matter whatfoever; for in the next clause is, "any lands, tenements, or hereditaments, or any thing whatsoever;" and afterwards towards the end, "as shall and may serve to and for such title, claim and matter;" and therefore this act extends to letters-patents of creation of dukes, marquiffes, &c. and to pardon of treasons, and all other letters-patents which at the time of exemplification or constat are in force, and lawfully surrendered or cancelled, which concern any inheritance, franchisement, or chattels, any thing or matter, real, personal, or mixt whatsoever.—Co Litt. 225. b. S. P.—S. C. cited and allowed as to the point of pardons. Carth. 138. Pafeh. 2 W. & M. in B. R. in the Cafe of Biffe v. Harcourt.

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4. Exemplifications of depositions taken in Chancery to prove one's being of age when he levied a fine was allowed as evidence, and the jury regarded it more than the fine's being reversed for non-age. Dy. 301. pl. 40. Trin. 13 Eliz.

5. 13 Eliz. cap. 6. An exemplification, or constat of a patent un-

der the Great Seal is sufficient for the patentee.

6. The Court ordered an exemplification of a deed to be pleaded at law where the deed could not be brought. Toth. 153, 154. cites

33 Eliz. Fisher v. Smith.

8. 13 Eliz. cap. 6. An exemplification of the inrollment of the letters-patents by H. 8. E. 6. Qu. M. Ph. & M. Qu. Eliz. or any of them, fince the 4th Feb. in the 27 H. 8. or hereafter to be granted by the Queen, her heirs or successors, shall be of as good force to

be shewn and pleaded in behoof of the patentees, their heirs, and succeffors, and affigns, and every other person having any estates from, by, or under them, or any of them, as well against the Queen, her heirs or fuccessors, as against any other persons whatsoever, as if the letters-patent themselves were produced.

9. 17 Eliz. cap. 9. f. 8. The exemplification of records of any fine or recovery inrolled, or any part thereof, in the twelve shires of Wales, and the town of Haverford West, under the judicial seal, or in the counties palatine under the feal of the respective county palatine,

shall be of as good force as the original record itself.

10. In ejectment upon the issue of not guilty, the defendant \* But it was gave in evidence a recovery in Wales in a quod ei deforceat, and iffue resolved it being tendered thereupon, the defendant produced an exemplifica- Sid. 145. S. tion under the feal of the great fessions, but not the record itself, C. as being whereupon the plaintiff demurred to the evidence, and after long under the Great Seal arguments it was faid by judges, that an exemplification of a re- of Breckcord in Wales might not be given in evidence \* while the record nock, and itself is in being, unless the same were exemplified under the judgment Great Seal, and then the Court ought to take notice; but not fendant. of other inferiour feals, but an exemplification may be produced in evidence in the fame Court to prove a record upon a nul tiel record pleaded, but agreed that a fworn copy of a record in [ 116 ] Wales might be given in evidence. Hard. 118, 119, 120. Trin. 1658. in Scacc. Oliver v. Gwyn.

11. In evidence to a jury at bar of Essex in ejectment, Maynard pro defendant offered an exemplification under the Great Seal in 1588. of depositions in Chancery, whereby a conveyance made in 86, and loft, was proved; and the Court agreed, that being fo old, and the records of the rolls burnt fince, it is good evidence, though the bill and answer were not in it, which, per Twisden and Maynard, was used but thirty years last past, and before it was not usual to infert the bill and answer; and this was given in evidence in a former trial here at bar, though it appeared to be a bill of discovery by Francis Moor and Rich. Moor his father, under whom the plaintiff claimed as heir, the defendant as purchaser, because the depositions of such are never published without notice given to both parties. 2 Keb. 31. pl. 65. Pafch.

18 Car. 2. B. R. Blower v. Ketchmere.

12. Copies of depositions are not to be allowed or exemplified.

2 Chanc. Rep. 36. 21 Car. 2. Brabant v. Perne.

13. The defendant fetting up an entail, the plaintiff exhibited 3 Keb. 310. an exemplification of a recovery in the Marquiss of Winchester's in S. C. cites it as Court in ancient demesse, the other side objected that they did Peter's not prove it a true copy, but because it was ancient the Court Case, and faid they should not be so strict upon the evidence of it, for the that the exother fide faid the Court-rolls were burnt in the Baseing-house tion under in the time of the wars, and Hales faid the mayor of Bristol had the mayor's offered in evidence an exemplification of a recovery under the town- was judge of feal of houses in Bristol, the records being burnt, and that ex- the Court, emplification

was allowed emplification was allowed for evidence. I Mod. 117. pl. 17. by all the Pasch. 26 Car. 2. B. R. Green v. Proude. judges of

England .-Vide S. C. cited Arg. Hardr. 179. as held accordingly, in the time of Wild C. B. in Whitehead's

> 14. Will exemplified under the Great Seal is not evidence to a jury in ejectment. Cumb. 46. Pasch. 3 Jac. 2. B. R. Anon.

> 15. In replevin, exception was taken to the avorury, that the demife of the manor for ninety-nine years was alleged to be to Sr. H. B. &c. by indenture under the Great Seal prout by inrollment of the faid indenture in Chancery it appears, but did not produce any exemplification or constat thereof; but after it is alleged that this indenture is lost; but that the faying that the indenture is lost is not sufficient; for if this should be allowed the statute of 3 & 4 E. 6. cap. 4. was made to no purpose, by which act in such case, title may be made by producing an exemplification or conflat, &c. And to this all the Court at first inclined if it was not aided by the confessing it in the bar by a direct bene & verum est; but afterwards Powel and Rookby Justices held, that it was not aided; but this was not fully refolved per Curiam; and the reporter adds a quære alfo if advantage can be taken of it unlefs by special demurrer, 2 Lutw. 1171, 1172. Hill. 1 W. & M. in Case of Hill v. Bolton.

> 16. Exemplification of letters-patents of a grant of feefarm rents was produced, but so far only as concerned this grant was shewn forth and good. Carth. 209. Hill. 3 W. & M. in B. R.

Tucker v. Hodges.

17. Exemplification of part of a patent not allowed to be read in evidence, notwithstanding the statutes of 3 & 4 of Edw. 6. & 13 Eliz. in cases where the other side have not time to confult the patent-roll, and so may be surprised by an imperfect exemplification. Chanc. Prec. 59. pl. 56. Mich. 1695. Attorney-General, at the relation of the Inhabitants of Stains v. Taylor.

18. Plaintiff would have read in evidence an exemplification of part of a patent, but defendant objected, that nothing but the patent itself, or an exemplification, or copy of the whole could by law be evidence; and it was not suffered to be read in evidence, notwithstanding the statutes of 3 and 4 of Ed. 6. and 13 Eliz. where the other fide have no time to confult the patent-roll, and so may be furprised by an impersect exemplification. Chanc. Prec. 59. Mich. 1695. Attorney-General at the relation of the Inhabitants of Stains v. Taylor.

19. To prove the delivery of goods to a master of a ship, an exemplification of the entry thereof was offered in evidence, which entry was made in the custom-house books at Rotterdam, attested by a publick notary, and fealed with the publick feal there; but the Court would not admit this exemplification to be given in evi-

dence. 8 Mod. 75. Pafch. 8 Geo. The King v. Mason.

[ 117 ]

#### [A. b. 34] Fine.

7. A fine may be given in evidence to a jury, though not under the feal of the Court or Great Seal. Pl. C. 410. b. Mich. 13 and 14 Eliz. Newys v. Larke.

### [A. b. 35] Foreign Letters in a strange Language.

1. In a cause in Canc between two Jews several letters written in Portuguese were translated ( without order of the Court ) and the English copies were proved to be true copies of the originals; but per Master of Rolls these are no evidence, for the Court always appoints a translator, and he would not allow these English copies to be read, although it was faid the Portuguese letters were also proved. Pasch. 9 Geo. in Canc.

### [A. b. 36] Goldsmith's Note.

1. Goldsmith's note to pay is evidence of his receiving money. 4 and 5 Ann. 1 Salk. 283. pl. 14. Hill. 12 Will. 3. Ford v. Hopkins.

cap. 9. ac- la cordingly.

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But though the note itself is evidence now of the confideration, yet it is not conclusive evidence, but turns the proof upon the defendant to shew that there was no consideration given for such a note; and so he can shew that it is still a simple contract, and so but a nudum pactum unde non oritur actio. And of this opinion was Ld. Chancellor King, and directed it to be fo ruled at Nifi Prius. Gilb. Rep. 154. Mich, I Geo. I. in Canc. Brown v. Marth.

### [A. b. 37] Guardian's Answer in Chancery.

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1. On a trial at bar in ejectment this question arose, whether For it is not the answer of a guardian in Chancery shall be received as evi- reason that what the dence in B. R. to conclude the infant, there being some opi- guardian nions that it ought to be read, and the defendant's counsel swears in infifting on the contrary, Mr. Justice Eyres being the puisne his answer should affect justice was sent to C. B. to know their opinions, who re- the infant. turning made this report, that the judges of that Court were 2 Vent. 72. all of opinion, that fuch answer ought not to be read as evidenec, Anon. and fo as to have for it was only to bring the infant into Court, and to make him a an opportu-3 Mod. 258. Mich. I W. & M. in B R. Eggleston v. nity to take party. Speke.

depositions and to exa-

nesses to prove the matter in question, and an infant is never concluded by any matter contained in his answer per guardianum. Carth. 79. S. C.—Show. 89. Edlestone v. Speake, S. C. but S. P. does not appear.—Comb. 156. S. C. but S. P. does not appear.

# [A. b. 38] Hearfay.

[ 118 ]

1. To prove a discharge of tithes by unity of possession in the time of the abbot, and at the time of the Diffolution two persons testified, that they had feen a deed of appropriation of the parfonage to the abbot, for which reason they verily thought there

was an unity of possession at the time of the Dissolution: but it was ruled to be no proof for it may be intended not to continue, and a consultation was granted, but they said that bearsay shall be allowed for a proof. Cro. E. 228. pl. 17. Pasch. 33 Eliz. B. R. Stansham v. Cullington.

2. On a modus alledged, it was agreed, that where the flatute appoints proof of the furmife to be by two, it is fufficient if two affirm that they have known it to be so, or that the common same

is fo. Noy. 28. Anon.

3. On a modus fuggested, and issue joined upon it, the witnesses said, that for a long time as they heard say, the occupiers of that farm, &c. had used to pay annually to the parson three shillings for all tithes, and it was agreed, that a proof by hearsay was good enough to maintain the surmise within the statute. 2 E. 6. Noy. 44. Web v. Petts.

4. Hearlay from others is not to be applied immediately to the prisoner; however those matters that are remote at first may serve to prove there was a general conspiracy to destroy the King and Government; and so was the constant rule and method about the Popish plot, first to produce evidence of the plot in general; by

Ch. J. cites Sidney's Cafe, Try. per Pais, 56.

5. Being told by perfons of good credit all along the road of the parliament's prorogation, is good evidence of notice in an action of false imprisonment. 2 Show. 300. pl. 302. Pasch. 31 Car. 2.

B. R. Verdon v. Deacle.

But then the record of that trial must be produced, elfe such 6. If a witnefs fwear in a cause and dies, per Cur. held, that in another trial one that heard him may upon oath repeat his testimony, and it shall be good evidence. 2 Show. 48. pl. 33. Pasch. 31 Car. 2. B. R. King v. Carpenter.

evidence is not to be admitted; per Pemberton Ch. J. Show. 163. pl. 152. Trin. 33 Car. 2. B. R.

7. Though a hearfay was not to be allowed as a direct evidence, yet it might be made use of to this purpose (viz.) to prove that a man was consistent with himself, whereby his testimony was corroborated. I Mod. 283. pl. 29. Trin. 29 Car. 2. B. R. Lutterell v. Reynell.

8. In a fuit between A. & B. A. produced a deed. In a fuit afterwards between C. & A. it was viva voce proved, that A. in a cause between A. and B. produced such a deed which proved so and so, &c. Per Cur. it is good evidence, for here A. may give that very deed in evidence if he will, which C. cannot, because it is in A's custody. Carth. 80. Mich. I W. & M. in B. R. Ecclestone v. Speke.

9. The fayings of old men not to be given in evidence on iffue, whether parcel or not parcel, as they may in case of a modus; co-

ram Baron Bury, at Launceston. Lam. 1710.

10. Question in ejectment, whether such a parcel belong to one or other; the declaration of a person who held under both, and deed was allowed as evidence by Ld. Ch. J.

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Hardwick. Summer affises at Exeter 1735. between Roll and Fellow.

11. In the case of murder, what the deceased declared after the wound given, may be given in evidence. Coram King Ch. J. apud Old-Baily, 1720. the King v. Ely.

12. In Trowter's Case, Pasch. 8 Geo. B. R. the Court would [ 119 ] not admit the declaration of the deceased which had been redu d into writing to be given in evidence without producing the writing.

#### [A.b. 39] Herald's Books.

1. Herald's books were admitted to be good evidence to triers of a challenge to prove confinage in the sheriff. 2 Plow. 426. a. Mich. 14 & 15 Eliz. C. B. in Cafe of Vernon v. Mannors.

2. In ejectment at a trial at bar, a herald's book being antient, But an exwas admitted as evidence to prove a pedigree, and an inquisition tract by the post mortem is likewise evidence, but not conclusive evidence. of the said 2 Jones 224. Mich. 34 Car. 2. B. R. Earl of Thanet v. Foster.

3. In this case the visitation-book of the county of Worcester by the heralds was allowed as evidence, being an original, but a copy has been often difallowed. Comb. 63. Mich. 3 Jac. 2. B. R. Matthews v. Port.

4. An entry in the Herald's Office shall not be allowed good Herald's evidence to prove a pedigree for an heir; because they are not books are matters of record, but allowed only as circumftantial evidence. dences to L. P. R. 557.

per Hale

Ch. J. 1 Salk. 281. pl. 9. Mich. 7 W. 3.

5. Herald's books not allowed as evidence to prove a pedigree at Sarum affises, Lent 1719. coram Fortescue A. in ejectment, for he faid it was made up by the party that signed it, and returned into the office, and not the entries of any publick office.

### [A. b. 40] History.

1. A general history may be given in evidence to prove a matter Speed's relating to the kingdom in general, because the nature of the thing Chronicle requires it, but not to proceed a particular right or well as the was given requires it, but not to prove a particular right or custom. I Salk. in evidence 281. pl. 9. Mich. 7 W. 3. B. R. Stainer v. the Burgesses of to prove the Droitwich.

Queen Dowager to E. 2. and though Maynard feemed to oppose it, and Dolbin said, it was done by consent, yet the Chief Justice said he knew not what better proof they could have, and Waller said that in the House of Lords it was admitted by them in Ld. Bridgwater's Case. Skin. 15. pl. 16. Mich. 33 Car. 2. B. R. Ld. Brounker v. Sir Robert Atkins.

2. In ejectment for the barony of Cockermouth, and all the honours, manors, &c. of Joceline the late Earl of Northumberland of the family of Piercy in the county of Cumberland, Sir William Dugdale's Book of the Baronage of England was offered in evidence;

fed non allocatur. 2 Jo. 164. Mich. 33 Car. 2. B. R. Piercy

3. Dugdale's Monasticon was refused in evidence to prove the abbey of Fountains of the order of Cistertians in the Exchequer in this term, because it might be proved by the records in the Court of Augmentation. The fame law of Dugdale's Baronage in Piercie's Case; le quel jeo observavi. Skin. 624. pl. 17. Mich. 7 W. 3. B. R. in Case of Steyner v. Droitwich Burgesses.

So that the 4. A deed was produced I W. & M. and Chronicles were addeed must mitted to prove that K. Philip did not use the stile which was in the needs be deed at that time. 12 Mod. 86. Mich. 7 W. 3. cites Neal v. Jay. forged. I Salk. 281. cites it as the Cafe of Neale v. Fry.

[ 120 ] Speed's Chronicle was given tho' Mayand faid it was done by

5. Upon an iffue out of Chancery, whether by the custom of Droitwich faltpits could be funk in any part of the town, or in a certain place only. Cambden's Britannia was offered in evidence but in evidence refused, for the Court held that a general history might be given in to prove the evidence to prove a matter relating to the kingdom in general, because death of Ifa-bell Queen the nature of the thing requires it, but not to prove a particular Dowager to right or custom. So in the Case of St. Katherine's Hospital Hale E. 2. and Ch. J. allowed a chronicle to be evidence of a particular point of nard feemed history in E. 3. time. 1 Salk. 281. pl. 9. Mich. 7 W. 3. B. R. to oppose it, Stainer v. Burgesses of Droitwich.

confent, yet the Chief Justice said he knew not what better proof they could have, and Waller said that in the House of Lords it was admitted by them in Ld. Bridgwater's Case. Skin. 15. pl. 16. Mich. 3 Car. 2. B. R. Ld. Brounker v. Sir Robert Atkins. Holt Ch. J. faid old manuscripts may be evidence, because an original, but not a copy for it is liable to a mistake of the transcriber. Skin. 623. pl. 17. S. C.——12 Mod. 85. S. C. accordingly.

> 6. There was a trial at bar concerning the right of vifiting Univerfity-college in Oxford. One of the issues in this case was, whether King Alfred was founder? and the counsel for the plaintiff would have given in evidence feveral historians as to this point. But the Ch. I. declared that fuch evidence is never admitted, unless in proof of a point concerning the Government; the rest of the Court did not deny it, accordingly it was waved. I Barnard Rep. in B. R. 14. Pasch. 13 Geo. 1. Cockman v. Mather.

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### [A. b. 41] Indorfement.

21d. Raym. Rep. 370. Mich. 11 Geo. S. C. tion Was brought on the faid bond, and before Ray-

1. In debt by administratrix on a bond to intestate dated 35 years ago; at the trial the plaintiff offered in evidence an indorsement by the inteffate's own hand of the payment of interest for I year after A new ac- the bond was 9 years old; but the Ch. J. who tried it would not admit it, because the indorsement being all his own hand-writing might be made at one time and dated at another, and being made by himself ought not to be given in evidence for him; plaintiff was nonfuited; and on a case stated by way of reference for the more Ch. J. opinion of the Court, it was argued for the plaintiff, that the rule

that no man can be evidence in his own cause is dispensed with in he admitted cases of necessity, where no other evidence can be had, as in the ments to be plaintiff's case, and the rather as it is to prove money paid in diseread, and charge of the defendant. Urged e contra, that if so any one, the jury who gets the possession of an old bond, may charge the obligor the plaintiff, after payment by making fuch an indorfement. Per two justices upon which no judgment can be given, as it comes not judicially before the a bill of Court. But after faid it was a question for the jury, whether exceptions was a true indorsement or not, and that this might be aded, and the mitted, because such indorsements are daily made, and at the re- Ch. J. figned quest of the obligor, and is the surest evidence, because acquittances may be loft, whereas the indorfement continues as long judgment as the bond itself. Ch. J. diffentiente, it was adjourned. 8 Mod. was given 279. Trin. 10 Geo. Serle v. Barington.

tiff, and on

error brought, the same was affirmed in the House of Peers.

#### [A. b. 42] Inquest of Office.

1. An inquest of office is no concluding evidence. 2 Jo. 224. Mich. 34 Car. 2. B. R. King v. Foster.

2. An inquisition not admitted to be read as evidence, there being no commission to warrant it. Jan. 23, 1717. MSS. Tab. Austin v. Nichols.

3. An old inquisition post mortem read as evidence without [ 121 ] producing the commission. MSS. Tab. Feb. 6th, 1726. Anderton v. Magawly.

# [A. b. 43] Inrollments of Deeds.

1. It was faid by Glyn Ch. J. that if divers perfons do feal a deed, and but one of them acknowledge the deed, and the deed is thereupon inrolled, this is a good inrollment within the statute, and may be given in evidence as a deed inrolled at a trial. Sty. 462. Mich. 1655. in a trial at bar. Thurle v. Madison.

2. Inrollment of a deed which needs no inrollment is no evidence.

1 Keb. 117. Mich. 13 Car. 2. Eden v. Chalkhill.

3. A question arising whether an inrolled deed should be evidence without further proof, a difference was taken where the estate passes by the inrollment, as in a bargain and fale, there it is an evidence; but where it is only for fafe custody, there it is not otherwife than against the party who sealed it, and all claiming from, by, or under him, and fo far it shall. 2 Freem. Rep. 259. pl.

327. Trin. 1702. Lady Holecroft v. Smith.

4. At a trial at bar in ejectment, the question was upon a commencement of a leafe, which was to be upon the determination of a lease then in being to Queen Elizabeth, of certain lands belonging to the church, and to prove fuch leafe to the Queen, an antient book in which entries were of leafes of these lands ever fince H. 7th's time, and this was found amongst the evidences of the bishops (this being bishop's land) was offered, but

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opposed, because not such good evidence as they might have had; for the lease being made to the Queen it must have been in-rolled, and then they might have brought a copy of the inrollment; for without an inrollment the Queen could not take, and it is better evidence of a lease in fact as well as in law than the book, and therefore must be produced. 6 Mod. 248. Mich. 3 Ann. B. R.

Shillingfleet v. Parker.

5. 10 Annæ 18. Where in any declaration or pleading whatsoever, an indenture of bargain and sale involled shall be pleaded with a profert hic in Curia, the person so pleading it may produce a copy of the invollment of the bargain and sale, which being examined with the invollment, and signed by the proper officer, and proved on oath to be a true copy shall be of the same effect, as if the original indenture of bargain and sale were produced.

Provided, that this act shall not give any benefit in pleading or deriving a title to any rent which hath not been paid or levied within twenty years next before the time of such pleading or deriving a title.

### [A. b. 44] Inspeximus.

inspeximus of a deed inrolled in Chancery, unless it be a deed of bargain and sale inrolled here; for if it be a deed of feoffment, he must shew the deed itself, for the inspeximus is no matter of record; but per Roll Ch. J. though it be the inspeximus of the inrollment, and not of the deed itself, yet if it be an antient deed it may be given in evidence. Sty. 445. Pasch. 1655. Anon.

2. The defendant in an ejectment on trial at bar, gave evidence on an inspeximus of a lease by the abbot of B. which the Court disallowed, being a private deed and may be forged, and an inspeximus lies only of matter of record, whereupon they shewed an allowance of the same deed in the Court of Augmentations, which per Cur. is good against the King. 2 Keb. 294. pl. 79. Mich.

19 Car. 2. B. R. Kirby v. Gibbs.

3. A conftat or inspeximus of letters-patents made since 27 H. 8. may be pleaded by the King's patentees, or any claiming under them, as well against the King as any other. Hawk. C. L. 311. (225)

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[A.b. 45] Inventory.

1. In an action of trover upon not guilty pleaded, an inventory of the goods was given evidence to the jury, as the goods were appraised by upholsters, judgment for the plaintiff. 4 Leon. 243.

pl. 396. Pasch. 8 Jac. C. B. Arden v. Goad.

2. Jones moved, that Hastings sheriff of Middlesex might bring in an inventory of goods taken in execution by sheri facias for evidence (in trover) of the value of the goods which the Court granted in a suit between other parties, the sheriff being not charged albeit he be not compellable on such a writ, but only on extent, and he agreed to bring it at the trial if he could find it.

2 Keb.

S. P.-

2 Keb. 277. pl. 39. Mich. 19 Car. 2. B. R. Baxter and Cramfield v. Seix.

#### [A. b. 46] Jointenancy.

1. Jointenancy cannot be given in evidence, but must be pleaded in abatement. L. Evid. 231. pl. 27. cites Tryal per Pais, 207. Hill. 1652. Jones v. Randal.

#### [A. b. 47] Journal.

1. Journal of the House of Commons is no evidence, because they have no power to give an oath; per Jeffries Ch. J. in Oates's tryal.

2. Journal of the House of Lords proved and admitted in the Bishop's trial, to prove the King's Speech 1662, and the opinion of the House of Lords about the King's power in ecclesiastical affairs.

# [A. b. 48] Minutes of Proceedings in Courts.

1. In an action for a malicious profecution brought against the defendant for indicting a bailiff for forcibly taking away his goods without a legal authority, the plaintiff to justify his having authority produced the minutes of a judgment in the Court-Baron, and likewife a warrant for execution made upon it; but the judge was of opinion that the judgment ought to have been drawn up, and that the minutes were not evidence of it. Accordingly the plaintiff was nonfuited, though Serjeant Urlyn submitted it, that 2 Mod. 306. is contrary to the judge's opinion. 2 Barnard. Rep. in B. R. 406. Hill. 7 Geo. 2. Pitcher v. Rinter.

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#### [A. b.49] In what Cases a Negative must be proved, and what shall be Proof thereof.

1. In a fuit for tythes in the Spiritual Court the defendant pleaded that the plaintiff had not read the thirty-nine articles, and the Court put the defendant to prove it, though a negative, whereupon he moved for a prohibition which was denied; for in this case the law will presume that a parson has read the articles; for otherwise he is to lose his benefice; and when the law presumes the affirmative then the negative is to be proved. I Roll. Rep. 83. pl. 29. Mich. 12 Jac. B. R. Monke v. Butler.

2. Witnesses cannot testify a negative, but an assirmative. 4 Inft. 2 Inft. 662.

279. cap. 64. 3. Where there is an affirmative affidavit and a negative affi- [ 123 ] davit, the affirmative affidavit of the plaintiff is to be taken. Cumb. 18. Pasch. 2 Jac. B. R.

4. Defendant swore an affidavit, and information against him for it, although a negative cannot be proved yet the Court directed that they should first give their probable evidence, and that the defend-VOL. XII.

ant should afterwards prove his affirmative if he could. Cumb. 57. Trin. 3 Jac. 2. B. R. The King v. Combs.

#### [A. b. 50] Nonsuit.

1. Debt on a bond in which obligee had made a material rafure, defendant pleaded non est factum, and plaintiff finding that defendant upon over had discovered the forgery, he countermanded the notice. The Court said the best way was for defendant to carry the cause down by proviso, and if the plaintist would suffer himself to be nonsuited, whereby the suit would be at an end, and the plaintist intitled to take his bond out of Court, yet that nonsuit would be great evidence against him in another action to be brought thereupon. 6 Mod. 233. Mich. 3 Ann. B. R. Selby v. Green.

### [A. b. 51] Notary Publick's Certificate.

1. It was refolved that a copy of an agreement registered in Holland, and attested by a publick notary there, may be given in evidence for the now defendant, especially since he proved that the plaintiff took out another copy of the same agreement, and would not now produce it; therefore the copy which the defendant had taken out was given in evidence, for it is plain that the plaintiff knew the agreement, he having taken a copy thereof, so could not be surprized. 8 Mod. 322. Mich. 11 Geo. Sir John Walrond v. Jacob Senior Henricus Van Moses.

2. The Court held that a plaintiff who was in Holland might make affidavit there, and get it attested by a publick notary; and that it should be admitted as evidence to hold the defendant to special bail here. 8 Mod. 323. Mich. 11 Geo. in Case of Sir John

Walrond v. Jacob, &c.

### [A. b. 52] Office found.

1. Nota, by Choke and Bryan an office before an escheator shall not be given in evidence unless it be exemplified, for it shall not otherwise be delivered to the jury unless it be under the Great Seal of England, no more than a testimonial, and it is good law. Bro. Gen. Isl. pl. 75. cites 21 E. 4. 25.

2. Office post mortem found was held to be no conclusive evidence. 2 Jones 224. Mich. 34 Car. 2. B. R. Earl of Thanet's

Cafe.

### [A. b. 53] Parliament Rolls.

1. Upon view of the parliament roll of the stat. 2 Ed. 6. for payment of tythes, and comparing it with the declarations in the Causes between Bowes and Broadhead, and Burreston and Herbert, it was found that the stat. was rightly recited, notwithstanding what had been objected, and the journal-book of parliament.

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ment produced to the contrary; and thereupon judgment was given in both cases, and Court said that they were to be ruled by the parliament-roll and not by the journal-book. And the same day in the Case between Boyer and Tantulyar for the same reason, and the Court ordered the parliament-roll to be brought into Court the next term to make it appear whether an adjournment in parlia- [ 124 ] ment was well recited, and would not credit the journal-book. Style 155. Mich. 1649. B. R. Anon.

### [A. b. 54] Parol Evidence contrary to Writing.

1. Parol agreement or evidence is not to be admitted against a S. C. cited deed, or a trust expressed in a deed; yet a declaration fully proved and by Ld. Ch. Reymade before a deed was drawn, and it appearing plainly to be the de- nolds. Gibb. fign of executing the deed for a particular purpose is proper and right. Rep. 213. 2 Chanc. Cases, 180. Mich. 2. Jac. 2 Harvey v. Harvey.

Hill. 4 Geo. fifted the

Ld. Chancellor in the Cafe of Fitzgerard v. Falconbridge, and his Lordship said, that though the general rule is, that no parol agreement or evidence is to be admitted against a trust expressed in a deed; yet as that case was, he thought that resolution was very proper and right; but if without such foundation we should admit parol proof against a deed, it would be of very ill consequence, and a

2. Parol evidence may be given concerning the election of an alderman, &cc. in a corporation, against an entry in the corporationbooks by the town-clerk, or other officer, for these may be cooked up for the purpose; per Parker Ch. J. Pasch. 4 Geo. B. R.

3. Parol evidence admitted to prove the effect of a record loft, and of another obliterated. Feb. 6, 1726. MSS. Tab. Anderton v.

Magawly.

# [A. b. 55] Presentment of the Forresters.

1. The presentments of the officers of the forest was sufficient evidence, that fuch wood and timber was felled, and there was no other evidence given. 1 Jo. 268. 8 Car. Itin. Windfor. Whitlock's Cafe.

### [A. b. 56] Prefumption. Length of Time.

1. Prefumptions are of three forts, viz. violent, probable, light and temerary; violent presumption is many times plena probatio, a clear proof; as if one be run through the body with a fword in a house whereof he instantly dieth, and a man is seen to come out of that house with a bloody sword, and no other man was at that time within the house. Probable presumption moveth little; but prefumption levis, or a light prefumption, moveth not at all; Co. Litt. 6. b. cites Bracton.

2. The abbot of S. held the parlonage of B. in the county of L. appropriate, which, as a parfonage impropriate came to K. H. 8. by the dissolution of monasteries, 31 H. 8. who in the

37th

37th year of his reign granted it in fee-farm, under which grant the plaintiff claims; the defendant has obtained a prefentation of the Queen, and to destroy the faid impropriation did shew the original instrument of it 22 Edw. 4. with condition that a vicarage should be competently endowed, and alledged that the faid vicarage was never endowed, and therefore the impropriation was void, and in truth there was no instrument, nor any direct proof of the endowment of the vicarage; but because the faid rectory was during all the time of the impropriation supposed reputed, and taken to be appropriate, and all that time a vicar prefented, admitted, instituted, and inducted as a vicar rightfully endowed, and paid his first-fruits and tenths, it was resolved by all the Court, that it shall be presumed that the vicarage, in respect of continuance, was lawfully endowed, for that omnia prasumuntur folenniter effe acta; and it shall be of dangerous precedent to examine the originals of impropriations of any parfonages, and the endowments of vicarages, because the originals of them in time will perish, and so it was decreed for the plaintiff. 12 Rep. 4. Trin. 30 Eliz. in the Exchequer-chamber, Crimes v. Smith.

3. An impropriation shall not be void because of an estate-tail in the patron, grantor, &c. but it shall be presumed, by reason of antient and continual possession; that an antient grant was made by one that had power to make it, and that it was duly made; for if any objection or exception should now prevail, the antient and long possession of the owners of the said rectory should hurt them; for if these objections or exceptions had been made in the life-times of the parties, without any question they had been answered, or otherwise in so many successions of ages it would have been impeached or impugned. 12 Rep. 4. Hill. 4 Jac. Bedle v.

Beard and Wingfield, in Canc.

4. In quare impedit in C. B. the fuit was flayed by aid prayer, and the record removed into Chancery; the plaintiff moved for a procedendo, and upon over of cause before Bromley Ld. Chane. &c. plaintiff shewed a gift in tail of the said advowson to his antecefior 18 R. 2. and a verdict for his anteceffor 12 H. 8. and a prefentation by his grandfather of a clerk who was admitted, inflituted, and inducted, with possession for certain years, and other matters to prove his title; yet because the defendant, and those from whom he claims time out of mind had the possession of the parsonage as impropriate (faving interruption for a small time) and it would be a dangerous precedent to owners of impropriations, being able to maintain the appropriations to be perfect in all points, requifite to the making an absolute and complete impropriation, the appropriations being made of antient time; it was refolved that no procedendo in loquela should be granted in Canc. 12 Rep. 3. Pasch. 4 Jac. Ld. St. John v. Dean of Gloucester.

15id. The 5. If a deed of feoffment be given in evidence to have been made reporter forty years past, but it cannot be proved that livery was made, yet if adds a reposter possession has all along gone with the deed, this is good evidence to the

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the jury; per Coke Ch. J. who faid, that in fuch case he would it seems the direct the jury to find a livery; for it shall be intended; but if jury may may direct the jury to find a livery; the jury find all this matter specially, we cannot adjudge it upon pre a good feoffment without livery. Roll. Rep. 132. in pl. 9. sumption, Hill. 12 Jac. B. R.

Court ought

to judge upon that which appears upon the record .-

6. If a parfon shews that for two hundred years certain land was parcel of his glebe, it is not therefore of necessity that the other should produce a confirmation from the patron, and ordinary; for the continuance in possession makes it intendable to be according to law when it was made. Cro. J. 456. pl. 13. Mich. 15 Jac. B. R. in Cafe of Griffin v. Stanhope.

7. Where there had been four fifters, and the question was as to their being alive, and who should prove it? Chamberlain and Doderidge held, that they shall be intended to be alive if the contrary be not proved. 2 Roll. Rep. 461. Mich. 22 Jac. B. R. Throg-

morton v. Walton.

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8. In things of great antiquity omnia præfumuntur folemniter esse acta; per Crew Ch. J. Palm. 327. Pasch. 2 Car. B. R. in

Cafe of Cope v. Bedford.

9. About eighteen years before the bill filed, Moyle the father became bound in a bond of 200 l. conditioned for the payment of 100 l. to the Ld. Robert the defendant at a certain day long fince past; afterwards the obligee purchased lands of (Rosecarrick) the principal obligor to the value of 5001. which purchase was made about four years before Rosecarrick's death; after his death Moyle took out administration to him, and being sued upon this bond, exhibited his bill for relief, and in regard of the antiquity of the bond, and for that Rosecarrick himself never fued in his lifetime, it was prefumed, that the defendant did deduct the debt out [ 126 ] of the purchase-money; and notwithstanding there were no proofs of the payment of the money made, the Court decreed, that the defendant should be restrained from the proceeding at law on the bond; per Ld. Coventry. N. Ch. R. 9. 5 Car. 1. Moyle v. Ld. Roberts.

10. A fleeping mortgage of seventeen years due, which time the mortgagor and a purchafor under him have been in quiet poffession, and the mortgagee having purchased lands of the mortgagor and paid him money shall be presumed to be satisfied, and decreed that the mortgage-deeds be delivered up to be cancelled. Chanc. Rep. 60. 8 Car. 1. Sibson v. Fletcher.

11. After long possession as for twenty-five years, livery and feisin shall be presumed; for this is much favoured in law as well as in equity. Vern. 196. in pl. 192. cites 11 Car. 1.

Biden v. Loveday. 12. Reconveyance of lands, which were a fecurity for a recognizance to pay an annuity, gives a probable reason to imagine that the recognizance was discharged, and no part of the said annuities being paid for feveral years after, and though demanded yet

being denied; decreed that the fame be vacated. Chanc. Rep. 102. 12 Car. 1. Baldwin v. Proctor.

13. Whether after forty years possession of a copyhold under a will, a furrender to the use of the will shall not be presumed? Ld. Keeper was clear that the want of a surrender should be supplied, furrenders being kept by the lord and his flewards, who are oftentimes changed, and not so careful as they should be, and therefore a furrender might be lost without the default or negligence of the party. Vern. 195. pl. 192. Mich. 1683. Lyford v. Coward.

14. Length of time is only a prefumption of payment, and there is a difference between debts and legacies as to their antiquity. Legacies always appear upon the face of the will, and fo an executor knows what he ought to pay without being asked or told; but for debts and other dormant demands, against which he cannot provide without notice, the statute had reason to limit the time. Vern. 256, 257. pl. 140. Mich. 1684, in the Cafe of Parker v. Afh.

15. Where two facts are alledged against the same man, and it be questioned whether it be the same man, it is sufficient that it be reported; and this is good evidence, unless some one else of the fame name be produced. L. E. 278. pl. 8. cites Oates's Try. 15.

16. If defendant pleads payment of a bond or bill, and it appears that the debt is very old, and hath not been demanded nor any use paid for it for many years, a common prefumption is good evidence that the money is paid, and the juries used to find for the defendant in fuch cases. Try. per Pais, 7th edition, 311.

# [A. b. 57] Probate.

1. If a testament be rased in the name of the executors, yet writ pl. 28. cites shall go by them; for it appears in the register if they were made executors or not; and also the party may traverse, that they were not executors, notwithstanding the testament; per Newton and all his companions; Brooke fays, and fo fee, that the probate (as it feems) is not matter of record at the common law. Br. Testament, pl. 4. cites 22 H. 6. 52.

2. Testament proved under the seal of the bishop is only estoppel.

Br. Estoppel, pl. 36. cites 44 E. 3. 16.

3. The probate of a will, if it respects lands, shall be no evidence at common law, nor shall examination of witnesses of the probate be made use of at common law. Cro. C. 395, 396. pl. 7. Hill. 10 Car. B. R. Netter v. Bret.

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4. In ejectment of term for years; the plaintiff claimed by letters of administration granted by the Archbishop of Armagh (the lands lying in Ireland) and the defendant produced a probate of a will made by the testator, and in which defendant was made executor, and this was under the feal of the Bishop of Fernes (where the land lay); this is conclusive evidence, and nothing can be given in evidence against it but forgery, or its being obtained by surprise;

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and if a verdict be given contrary to the probate, the defendant ought to demur upon the evidence, and not bring a \* writ of error, \* Jo. 146.

for if he does the judgment will be affirmed, for the jury may haonly upon zard an attaint if they will. Raym. 404. Mich. 32 Car. 2. B. R. the writ of Chichester v. Philips.

5. To prove the fealing and delivery of a deed, and not knowing the parties that did it is not good evidence; but if he knows the party upon fight of him it is good enough. T. per Pais, 172.

6. In a writ of error on a judgment in the Common Pleas in judgment Ireland in ejectment this question arose upon a bill of exceptions, was in C. B. which was preferred, because the judges there would not direct in Ireland. the jury that the probate of a will before the Archbishop of Canter-in error bury in whose province the testator died, and also before the Bishop of there in B. Fernes was sufficient and conclusive evidence, but only that they R. and now were good evidence, and so left it to the jury; to which the other the whole fide shewed in evidence letters of administration of the goods under Court of the feal of the Primate of Ireland; the thing in question was a leafe B. R. here for years in Ireland, claimed by the lessor of the plaintist under land, bethe faid administration, and on the first opening of the cause, cause the judgment was affirmed. 2 Jon. 146. Pafch. 33 Car. 2. B. R. theevidence Philips v. Chichefter.

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jury may hazard an attaint if they please, and the proper way had been for the desendant to have demurred on the plaintiff's evidence. Raym. 404. Chichester v. Philips. S. C.

7. At Rygate in Surry, fummer affifes 10 W. 3. it was ruled by Holt Ch. J. upon the evidence, that because in the Spiritual Court after probate of a will fix months are allowed to register it, and when it is registered, it is registered by the original, but the probate is figured by the register only upon the attestation of the proctor and the examination of him; therefore a will proved in 1666. in the Archdeacon's Court of London, and the office was burnt in the fire of London foon after, and the probate was produced in evidence to prove the will with all these circumstances; it was denied by Holt Ch. J. to be good evidence to prove the will. Ld. Raym. Rep. 732. Anon.

8. N. B. In this Case, though the will was made in 1685, yet infifted to have it proved, and the Court would not allow the probate to be read, that being in nature only of a copy, and cannot be read as to lands, unless the original be lost. The will was proved in a former cause, and order for reading the depositions in that cause, but the will produced not being marked by the examiner as an exbibit, objection was taken bac causa as to its being read, but the will being fet forth in hee verba in the interrogatory, and being examined in Court with it, the will was ordered to be read; but agreed it could not be read out of the interrogatory, because that is no more than a copy and only evidence when the original is loft. And King Chancellor examined the officer who brought the will into Court, where he had the will, &c. though no order in the cause to examine viva voce. Wiseman's MSS. Rep. Mich. 2 Geo. 2.

in the Case of Lady Jones v. Ld. Say and Seal.

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### [A. b. 58] Proceedings in Courts Spiritual.

8 Mod. 181. Trin. 9 Geo. Hilliard v.

1 Lev. 235. S. C .-2 Keb. 337. pl. r. S. C. adjudged for the plaintiff.

1. A thing concluded in the Ecclefiaftical Court touching lands cannot be given in evidence at a trial at law for land; per Cu-Phaley S. P. riam, Sty. 10. Pasch. 23 Car. B. R. in Case of Betsworth v. accordingly. Betfworth.

> 2. In debt upon a bond by an executor's plea ne unques executor, &c. and on this iffue at a trial a will under the feal of the Ordinary was offered in evidence, upon which the defendant offered to prove that the will was forged; but per Cur. (on a cafe stated by the opinion of the Court) nothing can be given in evidence against what is adjudged and allowed in the Spiritual Court, but it may be given in evidence that it is not the feal of the Ordinary, or that the feal is forged, or that it is repealed, for these things are in affirmation of the spiritual proceedings. No difference between an administration under feal, or a will of goods under feal. So here the defendant may give in evidence that there were bona notabilia, contra that another is executor, or that the testator was not compos mentis, for these falsify the proceedings of the Ordinary in cases whereof he is a judge. 1 Sid. 359. Raym. 404. 407. Pasch. 20 Car. 2. B. R. Noell v. Wells.

> 3. In trespais the defendant pleaded simony in the plaintiff (against whom a sentence or decree had been given in the Spiritual Court for the fimony) and now upon the trial the defendant offered to read the proofs in the Spiritual Court, but was not allowed, because those Courts are no Courts of Record; but the sentence of deprivation was allowed to be read. It was objected against reading them, that the plaintiff ought not to be concluded of his interest in his freehold by what was done in the Spiritual Court. But the Court faid that the Spiritual Court did not by fentence oust him of his freehold, but that it was a consequence of the fentence; and that fimony being a matter they had properly cognizance of (for though fince 31 Eliz. cap. 6. the Temporal Courts have jurisdiction, yet that statute has not taken away the jurisdiction which the Spiritual Court had at common law) they ought not to ravel into the grounds of the fentences, but to give credit to them, as they should in a certificate of marriage or baftardy and other things which lie within their conusance, fo that they must take him as guilty of simony, he being deprived of it in the Spiritual Court. Freem. Rep. 84. pl. 103. Pasch. 1673. Phillips v. Crawley.

> 4. Upon a trial at bar in ejectment the sole question was, if Sir Robert Carr was actually married to Isabella Jones by whom he had iffue, and under whom the plaintiff claims. The defendant by way of anticipation to the evidence which the plaintiff was about to give, moved the Court, that the plaintiff ought not to be allowed to prove a marriage between them, because there was a fentence in the Arches, upon a fuit brought against her causa jactitationis maritagii; by which it was decreed, that there was no marriage be-

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tween them, but that they were free one of another, and that they might marry separately, which they afterwards did. And this sentence was now offered in evidence by the defendant's counfel, as a bar to conclude the plaintiff from any proof of the marriage, unless he could shew that the same was repealed. And upon debate the Court were all of opinion, that this fentence, whilft unrepealed, was conclusive against all matters precedent, and that the Temporal Courts must give credit to it until it is reversed, it being a matter of meer spiritual conusance. And hereupon the plaintiff was nonfuit. Carth. 225, 226. Pasch. 4 W. & M. B. R. Jones v. Bow.

5. A matter which has been directly determined by their fentence cannot be gainfaid, their fentences are conclusive in fuch cases, and no evidence shall be admitted to prove the contrary; but that is to be intended only in the point directly tried; otherwise it is [ 129 ] if a collateral matter be collected or inferred from their fentence; as where, because the administration is granted to the defendant, therefore they infer that the plaintiff was not the defendant's husband, as he could not have been taken to be, if the point tried in their Court had been married or unmarried, and their fentence had been not married. Per Holt Ch. J. 1 Salk. 290. pl. 30. Hill. 7 Ann. Blackham's Cafe.

6. Proceedings in the Spiritual Court against the father for incontinency with the mother cannot be given in evidence against the children not deriving any title under her to the lands in question, and the intent of reading it being to shew that the mother's marriage was not until after their births, was not allowed by the judge to be read, which the Ld. Chancellor thought hard of. 8 Mod. 180. Trin. 9 Geo. Hilliard v. Phaley.

7. But if there was a marriage and they were divorced for confanguinity, fuch fentence would have been conclusive evidence to bastardize the children born in wedlock before the divorce, and what could be better evidence in a Court of law to shew there was no marriage than a fentence in the Spiritual Court carried on in a regular fuit, and pronounced in the life-time of the parties that they were guilty of fornication, and the proof of the commutation-money paid by the father. Per Ld. Chanc. 8 Mod. 180. Trin. 9 Geo. Hilliard v. Phaley.

### [A. b. 59] Proclamation.

1. In case on a wager about the day on which the peace was concluded, it was held by Holt Ch. J. that a printed proclamation was good evidence though not examined by the record inrolled in Chancery, nor proved to have been under the Great Seal. 12 Mod. 215. Mich. 10 W. 3. Dupais v. Shepherd.

2. Proclamations must be examined with the original; per King Chanc. Trin. Vac. 1727.

### [A. b. 60] Receipt.

1. In debt for rent, on reference to the secondary to see if all were paid, he reported, that a receipt of the last half year's rent was shewed in discharge of all former arrearages; but per Cur. this is only evidence of payment of all, but is no discharge of the former arrear, unless it be under hand and feat, and then but by estoppel. 2 Keb. 346. pl. 25. Pasch. 20 Car. 2. B. R. Coome v. Denne.

2. A receipt of the last half year's rent is evidence that all before was paid. L. E. 204. cites Tr. per Pais, 211.

### [A. b. 61] Recital.

1. It was faid, that if a deed express a consideration of money upon the purchase made by the deed, yet this is no proof upon z trial that the monies expressed were paid, but it must be proved by witnesses. Sty. 462. Mich. 1655. B. R. Thurle v. Madison.

2. Recital in a patent of a former patent is no evidence without producing the first patent. 2 Lev. 108. Trin. 26 Car. 2.

B. R. resolved in Case of Cragg v. Norfolk.

3. Error of a judgment upon a demurrer to evidence in C. B. the witness to the fealing and delivery of a deed being subpanaed did not appear; but to prove it the party's deed, they proved an indersement made by him thereupon three years after, reciting a provife within, that if he paid fuch a fum the deed should be void, and acknowledging that the faid fum was not paid; and 130 ] a fine was levied of the very lands mentioned in the deed to Crawly, and by the indorfement he expressly owned it to be his deed, and upon this the deed was read; and now it was objected, that this was not good evidence, because not the best the nature of the thing could bear, but only circumstantial, which never ought to be admitted where better may be had ex natura rei, because circumstances are fallible and doubtful; and it is upon this reason that a copy of a record is good, because one cannot have the record itself, but a copy of a copy will not do. Holt Ch. J. faid, Can there be better evidence of a deed than to own it, and recite it under his hand and feal? Et per totam Curiam judgment affirmed. 12 Mod. 500. Pafch. 13 W. 3. Dillon v. Crawly.

4. A fine was produced but no declaring the uses; but a deed was offered in evidence which did recite a deed of limitation of the uses; and the queition was, whether that was evidence? And the Court faid, that the bare recital of a deed was not evidence, but that if it could be proved that fuch a deed had been, and loft, it would do, if it were recited in another; and it not being proved that ever there was a deed leading the uses of the fine, the counfel on one fide opposed the faid deed of recitals being at all read; but the Court faid, we cannot kinder the reading of a gi E

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deed under feal, but what use is to be made of it is another thing.

6 Mod. 45. Mich. 2 Ann. B. R. Ford v. Ld. Grey.

5. The recital of a lease in a deed of release is good evidence of 6 Mod. 44. fuch lease against the releasor and those that claim under him; but Mich. 2 not as to others, without proving there was fuch a deed, and the S. P. that it was loft or destroyed.

Cafe of Ford v. Ld. Grey.

6. A. gave a bond to B. for payment of 2000! within a year Ibid. 434. after his death (he having feduced her and had a child by her) a note is afterwards A. by deed-poll reciting that he had given a bond editor, that, (as above) agreed the 2000 l. should be laid out in annuity for the use agreeable to of B. and the child for their lives. A. died. B. fued the admi- this decree, nistrator on the bond, but there being only one witness to it, and decree made (though his hand-writing was proved, yet) he fwearing that he 11th Dec. did not fee the bond fealed and delivered, B. was nonfuited, and 1735, by hrought her hill to be raid out of the affets. Id. Chang King Ld. Ch. brought her bill to be paid out of the affets. Ld Chanc. King Talbot. held, that the recital in the deed, that A. had given fuch Cray v. a bond was fufficient evidence of there having been fuch; that Cray and it is a confession by the obligor himself, and stronger than a verbal confession, being under his hand and feal, and decreed accordingly. 2 Wms's. Rep. 432: Hill. 1727. Annandale (Marchioness) v. Harris, & e contra.

#### [A. b. 62] Record.

1. When the party makes a title by record, he must shew it under the Great Seal, unless in the same Court, and day is given to bring it in. Pl. C. 411. a. Mich. 13 & 14 Eliz. in Cafe of Newys v. Larke.

2. In pleading a man cannot make himself a title in any case by If nul tiel record, without shewing it under the Great Seal. Pl. C. 411. record be

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to have in readiness the record exemplified under the Great Seal, unless in case of letters-patents. 2 Sid. 145. Per Witherington Ch. B. in delivering the opinion of the Court, Hill. 1658. cites 6 Rep. Eden's Case, and Bartue's Case.

3. A deed of uses was lost, and to supply it, evidence was [ 131 ] given, that the lost deed had formerly been shewed in evidence in the Exchequer upon an alienation there questioned, the land being holden in capite, and the record thereof was shewed, and this was allowed for evidence. Clayt. 85. pl. 131. 16 Car. before Foster J. Ld. Wharton's Cafe.

4. If a record be given in evidence the jury may find it, though it is not fub pede figilli, if they have other good matter of inducement to prove it; but if it be given in evidence, it must be fub pede figilli per Roll. Ch. J. Sty. 22. Pasch. 23 Car. B. R. in Case of White v. Pynder.

5. Indebitatus assumplit for 51. received to the use of the plaintiff

plaintiff for fees of his office of Clerk of the Peace for Oxfordthire; upon non affumpfit pleaded, it was infifted that the plaintiff had forfeited the office by not taking the oaths within the time appointed by law, and to prove it, the record of fessions was given in evidence, and held good. I Salk. 284. Mich. 12 W. 3. B. R. Thurston v. Stafford.

6. No particular crime shall be proved against a witness, except the record of his conviction be produced. L. E. 35. pl. 2.

[A. b. 63] Recovery. In other Courts than those of Westminster.

A recovery may be dence to a Court or the justices,

1. Upon a trial in Herefordsbire for lands in the county of Breckgiveninevi- nock, a recovery had in the Grand Seffions of Wales was produced in evidence under the Great Seal of that Court; and it was objected, jury, though that the Courts at Westminster could not take notice of it; but not under adjudged, that fince the Grand Sessions is appointed by act of parliament, viz. by the statute of 24 H. 8. cap. 26. the Courts Great, Seal. of Westminster ought to take notice of it. 2 Sid. 145. Hill. Pl. C. 411. 2. by all 1658. in Scacc. Olive v. Gwynn.

præter Harper, Mich. 13 & 14 Eliz. in Case of Newys v. Larke. - And it may be delivered in evidence; per Witherington Ch. B. in delivering the opinion of the Court in the Case of Olive v. Gwynn; cites S. C. But the chirograph of a fine may be given in evidence, but not delivered in evidence .-

# [A. b. 64] Register-Book.

S. P. Salk. 1. A register-book for entry of marriages, births, &c. is evi-281. in Case dence; per Glinn Ch. J. 2 Sid. 71. Pasch. 1658. B. R. in Dud-Burgeffes of ley's Cafe.

Droitwich. Mich. 7 W. 3. B. R .- 12 Mod. 86. S. C. & S. P. Obiter though it fays, that there is no law for it, but the nature of the thing requires it.

# [A. b. 65] Rent. Discharge thereof.

1. In debt for rent, on reference to the Secondary to fee if all were paid, he reported that a receipt of the last half year's rent was thewn in discharge of all former arrearages; but per Cur. this is only evidence of payment of all, but it is no discharge of the former arrear, unless it be under band and feal, and then but by estoppel. 2 Keb. 346. pl. 25. Pasch. 20 Car. 2. B. R. Coomes v. Denne.

# [A. b. 66] Rentals.

1. Bill in Chancery by trustees of a charity, to subject an estate to a rent of 31. 135. 7d. against the owners of the land, one whereof was lately purchafor, but had referved money in his hands on account of this rent, though not certain out of what lands it was issuing. Several Court-rolls were read where this rent was mentioned, but not faid out [ 132 ] of what lands, others mentioned lands in fuch a place. They read also

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papers, (copies of rentals given to bailiffs to collect by) and read evidence, that these bailiffs charged themselves with the sums there mentioned, for the charge of the bailiffs receipt that makes these rentals evidence, so the bailiffs accounts. Decree for plaintiff against all defendants, they joining in defence, and it not appearing out of what particular lands the rent was issuing, so no remedy at law. Pasch. 11 Geo. in Canc.

2. Antient rent-rolls proved by a receiver, denied to be read as evidence, but the decree reversed. April 1727. MSS. Tab. E.

Anglesey v. Ram.

3. A rental was but weak evidence, unless payment also proved, and not sufficient de se; coram Baron Cummins, at Taunton Assises, Hill. Vac. 1727-8.

### [A. b. 67] Reputation common.

The judges shall apprehend words as they are intended in places, where the land demanded lies. Palm. 102. Pasch.

17 Jac. B. R.

2. Usage may expound antient charters where the words are obsolete and obscure, and may bear several senses, but contral where the charter is of modern date. The reputation and declaration of people, may be given in evidence to explain old words in a conveyance in the description of an estate or lands; coram Baron Price, at Launceston.

3. No witnesses should be asked how the defendant stands affected; but if the defendant gives evidence of a general reputation, it may be answered by particular instances on the other side for the King. Comb. 337. Trin. 7 W. 3. B. R. The King v. Hains, Alderman

of Worcester.

4. The copy of a private act of parliament may be given in evidence, and if upon collateral issue it is to be proved that such a one was justice of the peace or baronet, &c. common reputation is sufficient proof without shewing the commission, or letters-patent of the creation. L. E. 89. cites T. per Pais, 226.

### [A. b. 68] Rule of Court.

1. It was ruled by Treby Ch. J. of C. B. at Guildhall, Pasch. 10 W. 3. that if at the trial at nisi prius a rule of the Court of C. B. or B. R. be produced under the hand of the proper officer, there is no need to prove it to be a true copy, because it is an original. Ld. Raym. Rep. 745. Selby v. Harris.

### [A. b. 69] Seals of Courts.

1. A recovery under the feal of Brecknock is evidence; per Witherington Ch. B. 2 Sid. 146. Hill. 1658.

2. The feal of Chefter may be given in evidence; per Wither-

ington Ch. B. 2 Sid. 146. Hill. 1658.

3. The

3. The Courts at Westminster ought to take notice of the feal of the Grand Sessions in Wales, their authority being by act of parliament, and the profits of those seals are appointed to be paid into the Court of Exchequer; per Witherington Ch. B. 2 Sid. 146. Hill. 1658.

4. Moreton Serjeant said, that he never saw the seal of any Court denied in evidence. Keb. 21. pl. 62. Pasch. 13 Car. 2.

B. R. in Case of Trowell v. Castle.

# [ 133 ] [A. b. 70] Sentence. In the Exchequer, as to Goods forfeited.

1. Upon a feifure of goods, as brandy, &c. if the property is once determined in the Exchequer upon an information, &c. and the defendant acquitted, the title shall not afterwards be drawn over again in another action. So if goods are condemned, the party is bound by this, and shall not have liberty afterwards to contest this in a collateral action; coram Baron Price, at Bodmyn. Trin. Vac. 1716.

[A. b. 71] Signet Manual of the King.

1. In case between A. & C. in Chancery, the King by letters under his signet manual certified the manner and substance of the agreement between them, and it was allowed as proof beyond exception. Hob. 213. pl. 271. 9 Jac. Abignye v. Cliston.

### [A. b. 72] Similitude of Hands.

1. In debt upon a single bill for the payment of 2001. on demand, upon non est factum pleaded, one witness gave full evidence of the sealing and delivery. On the other side was produced a person of the same name and surname with the other subscribing witness, who acknowledged that the hand was very like his, but that it was not his hand, and that he never knew either of the parties, nor the other witness, neither could the other witness say that he was the man; and both their reputations being proved good, Holt Ch. J. ordered both to write their names, which they did, and left it to the jury, who sound for the plaintiss. 6 Mod. 167. Pasch. 3 Ann. B. R. Osbourn v. Hosier.

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# [A. b. 73] Things done or fworn at another Trial.

But Doderidge J. held in lease to F. for life, remainder to the plaintiff for life; and at a trial that tenant for these tythes had by F. the first tenant for life in possession, several he in remainder have all one estate, and that the depositions taken in that cause might be read as evidence for the now tenant for life in remainder; but it was denied, because he in remainder was neither party or privy to the first suit. 2 Roll. to him that Rep. 211. Mich. 18 Ja. B. R. Shotbolt v. Frances.

for that first lessee when it was for the same title, may be examined for him in remainder; but that

as this case is, he said that it cannot be so, because it appears that there was covin in bringing the Last fuit, upon which the trial was in the Court of Wards, for the tenant for life and he in remainder for life shall not be prejudiced by the recovery and judgment had against the particular tenant for life; for these are privies to the action, and privies in interest, and recoveries had against privies to the action shall not prejudice privies in interest, for they are strangers to the fuit, and the action might have been brought against the other also who were privies in interest; and this was agreed to by all. Ibid. 212.

2. The evidence given upon an indistment cannot be offered by Sid. 224, either party as evidence upon an appeal of murder brought for the fame 325. S. C. offence, but the witnesses on the indifferent must appear than offence, but the witnesses on the indictment must appear them- accordingly. felves to give their own testimonies. Neither can the evidence on an indictment of trespass be given in evidence on an action of trespass, although the witnesses should be dead. Sid. 325. Paich. 19 Car. 2. B. R. Sampson v. Tothill.

3. Information against Buckworth for a perjury; upon not guilty pleaded, a witness was produced to prove the perjury; what one (who is fince dead) favore at the trial in which the perjury was supposed to be committed; and this was allowed by the opinion of two judges against one. Mich. 20 Car. 2. B. R. Raym. 170.

Buckworth's Cafe.

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4. One legatee shall have benefit of depositions taken by another le- Equ. Ab. gatee to prove affets. 1 Vern. 413. pl. 390. Mich. 1686. Coke v. 227. pl. S. C. and

S. P.-

5. Ejectment to prove a pedigree; it was allowed to shew that the defendant had at another trial for part of the same estate produced a deed of release, which had a clause in it to prove the pedigree. Objected that it was no evidence, because the now plaintiff was not a party, et res inter alios acta non nocet, and it is not mutual. And depositions taken to perpetuate the testimony of witnesses if the witness should die, are no evidence but only between the parties to the furt, fed non allocatur. For here the defendant may give this deed in evidence of the will, and it is reasonable the plaintiff should have advantage to prove it viva voce, because the defendant hath the deed in his custody, and may disprove the witness if he swore fallely. Carth. 79, 80. Mich. 1 W. & M. in B. R. Eccleston v. Petty, alias Speke.

6. In case, the plaintiffs prescribed to have a farthing for every quarter of malt brought by any of the west-country barges to London. On the general iffue a trial was at bar, where the plaintiff offered in evidence four several verdicts at nist prius against four west-country maltsters; and the Court admitted them to be given in evidence, though the defendant was neither party or privy to those records; for it is as reasonable that a recovery against a ftranger should be given in evidence as that payment of the duty should be proved by other strangers which was never yet doubted. Carth. 181. Hill. 2 & 3 W. & M. in B. R. The City of

London v. Clerke.

7. And per Holt Ch. J. If a lord of a manor claims fuit of his tenants ad molendinum by custom, &c. and in an action recovery is against one tenant, that recovery may be given in evidence in a like action to be brought against other tenants upon the reason

above, unless the defendant can shew any covin or collusion be-

tween the first action. Quod nota, Ibid.

8. Ordered upon a long debate, that the depositions of witnesses taken in a cause thirty years since about the same matters, being incumbrances and damnifications, should be made use of in this cause, witnesses being dead, though that fuit were between other parties from whom these claim not; and the Case between Trinity Hall and Doctors Commons cited, and between Charlton and Vaughan. 2 Freem. Rep. 184. pl. 258. Pafch. 1692. In Curia Cant. Terwit v. Gresham.

9. If a man was fworn a witness at a former trial, and gave evidence and died, the matter that he gave in evidence at the former trial may be given in evidence at another trial by any person who heard him swear it at the former trial. Resolved at a trial at bar. Ld. Raym. Rep. 730. Mich. 8 W. 3. in B. R. Pyke v. Crouch.

10. It was refolved Mich. 8 W. 3. in B. R. upon evidence in

a trial at bar,

1. That legatee cannot be a witness to prove the will, because the legacy is devised to him, unless he has released the legacy. But after such release he will be a good witness to prove the will; if the counsel of the other fide have permitted fuch legatee to be fworn, and to be examined as a witness to prove the will, without having taken exception against him, they cannot afterwards except against his evidence for the reason that he was a legatee.

2. If the duplicate of a will be written by the direction of the testator, and fent by him to a stranger to keep it safely, and the firanger fends back a letter to the testator, in which he makes men-[ 135 ] tion that he has received the faid will; after the death of the stranger such letter may be read as circumstantial evidence, to prove that fuch duplicate of the will was fent by the testator to

the faid stranger.

3. If a man produced as a witness for the plaintiff in ejectment confesses that there was such a will made as the defendant's counsel pretends, and under which the defendant makes title to the lands in question; yet that is not sufficient proof, to prove that there was fuch a will, but the will itself ought to be produced, or other legal

proof made of it.

4. If feveral estates in remainder be limited in a deed, and one of the remainder-men obtains a verdict for him in an action brought against him for the same land, that verdict may be given in evidence for the subsequent remainde-man, in an action brought against him for the fame land, though he does not claim any estate under the first remainder-man, because they all claim under the same deed. Ld. Raym. Rep. 730. 1. Mich. 8 W. 3. on a trial at bar. Pyke v. Crouch.

11. Conviction at fuit of the King for battery, &c. cannot be given in evidence in an action of trespass for the same battery, nor vice versa. 12 Mod. 339. Mich. 11 W. 3. in Case of King

v. Warden of Fleet.

12. The like law of an usurious contract. Ibid. Mich. 11 W. 3.

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13. No record of conviction or verdict can be given in evidence, but fuch whereof the benefit may be mutual, viz. where the defendant as well as plaintiff might have made use of it, bring it into Court, and give it in evidence in case it did for him. So if the record had been for the plaintiff's advantage, and that they could not give it in evidence, the defendant should not give it in evidence for that very reason; and this was resolved at another trial at bar before this term, between SHERWIN AND SIR WALTER CLARGES, where a verdict between the Earls of Bath and Mountague, upon the very fame point and title now in question, viz. the legitimacy of Christopher Duke of Albemarle, was denied for evidence. Ibid. 12 Mod. 339. Mich. 11 W. 3. King v. Warden of the Fleet.

14. In an inquisition against the Warden of the Fleet for misdemeanors, whereby he was to forfeit his office, a prisoner who had given bond to be a true prisoner was produced to prove that the warden fuffered him voluntarily to escape; resolved, that a conviction of the warden upon the prisoner's evidence of an escape would be no evidence against the warden in debt on the bond to be brought by the warden against the prisoner, so as to set it aside as a bond for eafe and favour, nor in action of falfe imprisonment by the prifoner for retaking him, because it would not be between the same parties. 12 Mod. 339. Mich. 11 W.3. Kingv. Warden of the Fleet.

15. Evidence given at a former trial, and between other parties, &c. is not evidence in another trial, &c. L. E. 32. pl. 60. cites

State Tr. 2 vol. 354. 380. 385.

16. By Jeffries, though in strictness we do not use to admit of what others have fworn at another trial, unless the party be dead that fwore it; yet the prisoner is something indulged so far as to be admitted to prove it. L. E. 278. pl. 9. cites Oates's, 2 vol. State

17. No evidence ought to be given of what an accomplice has faid, especially if not in the same indictment. L. E. 32. pl. 61.

cites State Tr. 2 vol. 436.

18. Yet a prisoner may bring evidence to prove the witness gave a different testimony before a justice of peace, or at another trial; but the Court will not command the depositions taken before the juftice to be produced for him to make use of. L. E. 32. pl. 62. cites 2 vol. State Tr. 578.

19. Answer in Chancery by a mother cannot be given in evidence against the children not deriving any title under her to the lands in question, and the intent of reading it being to shew that the mo- [ 136 ] ther's marriage was not till after their births was not allowed by the judge to be read, which the Lord Chancellor thought hard of.

8 Mod. 180. Trin. 9 Geo. Hilliard v. Phaley.

20. In trespass, the defendant produced a deed under the plaintiff's hand and feal, whereto were witnesses names, but because they did no prove the witnesses dead, nor that they were gone to sea, though they alledged it, it was not permitted at first to be given in evidence; but afterwards upon proof, that it was read at a for-VOL. XII.

mer trial, it was suffered to be read. Freem. Rep. 84. pl. 103.

Pasch. 1673. Phillips v. Crawley.

21. Where a new trial is directed upon the fame is between the fame parties, and a witness examined at a former trial dies before the fecond trial, depositions made by him in Chancery whence the issue was directed, and also what he swore at the former trial may be given in evidence. 2 Wms's. Rep. 563. Hill. 1729. Coker v. Farewell.

22. On feigned issue from the Exchequer to try a costom about grinding at Bovey-Mills in Devon by all the inhabitants of the parish, former decrees were admitted to be read in evidence, and said that former verdicts about customs had been admitted as evidence, although not conclusive evidence; at Exon assis, Lent, 1731.

[A. b. 74] Torn Papers, Books, &c.

1. In an action upon the case for taking the profits of the under elerk of the treasury, a note obtained by the Ld. Finch master of the office formerly, of the officers subscription that they were but servants (which by Allen for the plaintist is no more than some parishioners subscription to pay tythe in kind) which will not bind others; which the Court agreed, and resused to let it be given in evidence, especially part being cut off. 1 Keb. 258. pl. 36. Pasch. 14 Car. 2. B R. Whitchurch v. Pagett.

2. To prove taking of the oath, &c. in the Act of Uniformity a certificate was produced that had only a small bit of wax upon it. Per Twisden if it were scaled, though the scal was broken off, yet it may be read as we read recoveries after the scal broken off; and said he had seen administration given in evidence after the scal broken off, and so wills and deeds. I Mod. 11. pl. 34. Mich.

21 Car. 2. B. R. Clerk v. Heath.

# [A. b. 75] Transfer Books of a Company.

1. Transfer books of a company were allowed as evidence. 7 Mod. 129. Hill. 1 Ann. B. R. Gery v. Hopkins.

# [A. b. 76] Verdict.

1. A verdict against one under whom either plaintiff or defendant claims may be given in evidence against the party so claiming. Contra if neither claim under it. L. E. 95. pl. 22. cites Duke v. Ventres. Mich. 1656. B. R. Try. per Pais, 206.

2. Finding by special verdict, or admission by former pleading is good evidence, unless the contrary appear; agreed per Curiam. Keb. 720. pl. 30. Pasch. 16 Car. 2. B. R. Lee v. Boothby.

3. In an ejectment brought by a reversioner, or in debt upon statute of E. 6. by a proprietor of tythes, they may give in evidence a verdict for a former lesse, because the parties to this action could not have been parties to the former suit in that the then present lesse could be only party. Hard. 472. Hill. 19 and 20 Car. 2. Rushworth v. Pembroke.

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4. Verdict on a former trial ought not to be read as evidence on But in a a new trial in the same cause. Per Saunders Ch. J. 2 Show. 255. causeagainte pl. 262. Hill. 34 & 35 Car. 2. B. R. Rogers and Ux' v. dants on the Goddard.

Carth. 181. Hill. 2 & 3 W. & M. in B. R. City of London v. Clerk .- For if it were in affirmance of plaintiff's title they could not read it; as being between other parties; and what would not be evidence for one shall not be for the other. But notwithstanding the verdict was read to let them in to give evidence that a witness produced by plaintiff had sworn now directly contrary to what he had fworn at the trial. 12 Mod. 343. Mich. 11 W. 3. Sir Walter Clarges v. Sherwin.

5. Upon a trial at bar, in ejectment it was refolved per Curiam, that if a plaintiff hath a title to several lands, and brings an ejectment against several defendants, and recovers against one, he shall not give that verdict in evidence against the rest, because the party, against whom the verdict was had, might be relieved against it if erroneous, but the rest cannot, though they claim under the same title, and all make the same defence. 3 Mod. 141. Mich. 3 Jac. 2. B. R. in Case of Lock v. Norborne.

6. So if two tenants will defend a title in ejectment, and a verdict should be had against one of them, it shall not be read against the

other unless by rule of Court. Ibid. 142.

7. But if an ancestor has a verdict, the heir may give it in evidence, because he is privy to it; for he who produces a verdict must be either party or privy to it, and it never shall be received against different persons, if it does not appear that they are united in interest; therefore a verdict against A. shall never be read against B. For it may happen that the one did not make a good defence which the other may do. 3 Mod. 142. Mich. 3 Jac. 2. B. R. in Case of Lock v. Norborne.

8. Verdict in a civil cause may be given in evidence in a criminal cause; but not vice versa; and Court said, they would hardly grant a new trial where a verdict might become evidence in a criminal caufe. 12 Mod. 319. Mich. 11 W. 3. Richardson V.

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9. If defendant fued upon a forged bond, brings cafe for fueing him on a forged bond, a verdict therein will be evidence for him. Per Serjeant Darnell. 6 Mod. 234. Mich. 3 Ann. B. R. Selby v. Green.

# [A. b. 77] Water Courfes. Diverting them.

1. In trespass upon the case in turning part of a course of water Bends. 215. running from a spring in C. by a conduit to his house The pl. 249. S. C. and the evidence was that A. finding an antient pipe in his yard, through pleading. which the water was conveyed to the plaintiff's house, put a quill and a cork into the faid main pipe, and fo drew water to ferve his house, and stopped it as he pleased, and after his death his wife continued to do the same; and it was held that the action lay; for every opening was a new diversion. D. 319. b. pl. 17. Mich. 14 & 15 Eliz. Moore v. Brown,

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2. In

Skin. 175. S. C. Curia advilare Lev. 133. Nulmes v. Heblethwaite S. for the plaintiff in C. B. and judgment affirmed in B.R. Carth. the cause had been

2. In action on the case a special verdict was found that the plaintiff was feifed of a stream running through his land; and that about fixty years fince he had erected a water-mill upon his own freehold; and likewise it was found, how that the defendant was feised of an antient dam upon the same stream above the plaintist's mill, and how that the defendant had pulled down the faid dam, C. adjudged and thereby diverted the stream from the plaintiff's mill, whereupon the plaintiff commences this action. Pollexfen argued for the plaintiff, and cited Palmer 29. a. and 1 Cr. 575. and took that to be a clear case, that the stream being the plaintiff's, the defendant could not divert it, and so held the Court, that an action \$4. Hedie- had lain for diverting a stream, though no mill had been erected; thwaite v. and that therefore it need not be sherwn to be an antient mill, as it Mich. rw. must where he prescribes to have a water-course, where the [ 138 ] water is not his own; as the Court faid was the meaning of & M. in B. Lutterell's Case, 4 Rep. 80. for there prescribing to the water-R. the S. C. course he ought to shew that they were antient mills, but here he need not: so the Court seemed wholly for the plaintiff, for firmed; but here the stream is his own, so there needs no prescription. Holt Ch. J. Skin. 65. pl. 10. Mich. 34 Car. 2. B. R. Palmes v. Hefaid, that if blethwait.

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tried before him the plaintiff should have proved his mill to have been an antient mill, or been nonfuit. - 3 Mod. 48. S. C. in B. R. and judgment affirmed .- Show. 64. S. C. adjornatur .-

#### [A. b. 78] Year Books.

1. To prove the custom of a manor relating to copyholders about cutting down of trees, the book-case of 14 E. 3. tit. Bar. Fitz. was given in and avowed for good evidence. Godb. 235. pl. 326. Mich. 11 Jac. C. B. in Case of the Bishop of Chichester v. Strodwick.

2. A year-book is evidence to prove the course of the Court. 1 Salk. 281. Mich. 7 W. 3. B. R. Stainer v. the Burgesses of Droitwich.

# (B. b) What Things may be given in Evidence. Variance in Time or Place, &c.

1. EVIDENCE which is contrary to that in iffue, or which is not answerable to the matter in iffue, is not good; as nothing passed by the deed, and evidence that it is not his deed is not good, for it is contrary to the iffue, and to that which he acknowledged in his plea by implication. Kitch. 241. cites 5 H. 4.

Quære, for the jury broughthim in guilty

2. Upon not guilty in trespass de uxore rapta, et abducta cum bonis viri in London, it is no evidence for the plaintiff, that the adultery was committed in Southwark, and in Ratclif in Middlefex, whence

whence the defendant conveyed her to Richmond in Surry; for generally, this does not prove the defendant guilty in London. Dy. 256. b. tho' Dyer would have pl. 10. Mich. 8 & 9 Eliz. Anon.

it found fpecially.

3. In ejectment the plaintiff declared of a leafe 14th Jan. and the evidence was of a leafe the 13th, it is well; for if it was sealed and delivered the 13th, it was a lease the 14th. 4 Le. 14. pl. 52. Mich. 32 Eliz. C. B. Frice v. Foster.

4. Though an ejectment be laid on a certain day, yet if it be proved to be at any time before the action brought, or after the leafe made, it will do, but not otherwise. 1 Bulft. 122. Pasch. 9 Jac.

Hall v. King.

- 5. If the trespass in the declaration is laid in one day, and the evidence is of trespass in another, it is well whether the time be before or after the day laid. So if a promife is laid to be made one day, if this be found to be made of another, yet it is good. 1 Roll. Rep. 353. pl. 1. Paich. 14 Jac. B. R. in Cafe of Cooke v. Lankaster.
- 6. Yet a declaration was, that a testator for such a confideration in certain to him given 30th October 11 Fac. promifes to pay fo many quarters of barley before fuch a feast next following, &c. whereas the testator was dead before 30th October 11 Jac. and held, that the mistake being in the day of payment of the quarters, which [ 139 ] were to be paid at such a feast ensuing 30th October 10 Jac. the defendant might have excused himself by the death of the testator, and the issue is variant, and contract not the fame, supposing the 30th October had been in testator's lifetime. 1 Roll. Rep. 353. pl. 1. Pafch. 14 Jac. B. R. Cooke v. Lankaster.

7. In an information for an affault, &c. at Highgate, evidence of an affault at Westminster is good. T. 9. W. 5. Per

8. If the petition to the Lord Chancellor mentioned in the declaration recites, that the bankrupt was indebted in 300 l. and the petition produced at the trial recites, that he was indebted in 500 l. yet that is no material variance. Ld. Raym. Rep. 741. Kirne v. Smith, & al.

9. In an action for money which certain East-India goods were fold for at auction, the plaintiff in his declaration fet forth part of the articles of fale in hac verba, but not the whole. Upon which Mr. Kettleby took an exception, that there was a variance between the declaration and the evidence; and the Ch. J. at Nisi Prius in Guildhall allowed of the exception; accordingly the plaintiff was nonfuited. Barnard. Rep. in B. R. 303. Hill. 2 Geo. 2. Pitt v. Norman.

(C. b) Proof. Good or not, though it comes not fully up to the Suggestion.

I. IN debt upon a recognition the defendant pleaded nul tiel recognition, upon which iffue was joined, and a recognition upon condition was certified, and held good evidence to maintain this iffue; for recognition upon condition is a recognition. Hob. 55. per Hobart Ch. J. cites 36 E. 3. 5.

2. So it is if the variance of the contract be in the things fold; for it cannot be the same contract. D. 219. b. in pl. 11.

cites 21 E. 4.

3. The plaintiff pleads a lease simply, and gives in evidence a lease upon condition, and for that, that the condition is performed, it is good; for the evidence proves the effect and substance of the issue, and for that it is good. Kitch. 242. cites 14 H. 8. 20.

4. In action on the case by the husband on an assumpsit made to bim; the evidence was, that it was made to his wife, to which he

agreed; this is good. Kitch. 242. cites 27 H. 8. 29.

5. If in formedon in descender on a gift in frank marriage, upon traverse and iffue of the gift, a deed of gift in free marriage, with a remainder over to the demandants being given in evidence will not maintain demandant's writ. Plow. 14. a. Arg. Hill. 4 E. 6. in Cafe of Reniger v. Fogasta.

6. If plaintiff declare on a leafe by parol, and the same is traversed, evidence of a lease in fait will not maintain it. Plow. 14. a.

7. So of an agreement; a special agreement will prove it. Pl.

C. 8. b. Arg. Hill. 4 E. 6. in Case of Reniger v. Fogassa.

8. In debt to perform covenants, whereof one was, that he should not cut any trees to do waste, the plaintiff assigns the breach in cutting down twenty oaks; defendant pleaded that he did not cut twenty, nor any of them, whereupon iffue was joined, and the plaintiff proved ten oaks only to be cut dogun, yet held sufficient evidence to maintain the iffue; for the cutting of the ten oaks must needs be a breach of the covenant not to do waste. Dy. 115. b.

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pl. 67. Pafch. 2 & 3 P. & M. Teril v. Dune.

9. In a writ of entry of seventy acres of land in H. the tenant Neil. Abr. pleaded, that one C. was feifed in fee, and leafed the land to him for life, &c. the demandant replied, and likewise made a title under the faid C. absque hoc, that he leased to the defendant modo & as adjudged, forma, &c. and the jury found that C. and fix others were feifed of the seventy acres, and of a messuage in H. &c. to the use of the said C. and that they all joined in a lease of the said house with the appur-Dyer, or any tenances unto the tenant; one question was, if this demise by cestui que use and his feoffees jointly, be matter sufficient to maintain the iffue for the tenant. D. 158. a. pl. 31. Hill. 4 & 5 P. & M. Drew v. Marrow.

> 10. Iffue was taken upon the custom of a manor relating to a copybold eflate, whether the widow ought to hold for life, and

[ 140 ] 160. pl. 1. & 2. mentions S. C. but I do not observe any judgment in opinion of the Court.

the evidence proved only during her widowhood; and ill; quod nota. Heath's Max. 84. cites 1 & 2 Eliz. Dyer. 192.

holder in fee-tail or life is to enjoy it far life, evidence of enjoying it durante viduitate won't do, for it is a less estate. Dy. 192. a. pl. 23. Mich. 2 & 3 Eliz. 3. Linsey v. Dickson.

12. Debt on a bargain for 201: upon non debet the defendant may give in evidence that the bargain was only for twenty marks. Dy. 219. b. pl. 11. Mich. 4 & 5 Eliz. Bladwell v. Sleggin.

13. In trespass the defendant pleaded, that one Tindal was seised in see by protestation, and died seised, and that the land descended to the desendant; the plaintist replied, and traversed the seisin in see, upon which they were at issue, and the evidence to prove the seisin in see was, that Tindal was so seised a long time before he died, and aliened, and never was seised after. It was said that this evidence did not maintain the issue, for the seisin in see upon which the issue was taken, must be intended a dying seised, and not a general seisin at any time during his life, and Peryam and Anderson were of that opinion. 4 Leon. 97. pl. 200. Trin. 29 Eliz. Paston v. Townsend.

14. In replevin for 1000 beafts, the defendant justifies by reason of property, and in issue thereon the defendant in evidence may surmise a lesser number, and drive the plaintiff to prove a greater number, and what he fails of shall go in mitigation of damages, notwithstanding that the number in the plaint be by the defendant's plea quodammodo admitted. I Le. 43. pl. 54. Mich. 28 & 29 Eliz. C. B. Wood v. Foster.

15. G. P. brought trefpass against L. parson of the church of D. for the taking of certain carts loaded with corn, which he claimed as a portion of tythes in right of his wife, and supposed the trespass to be done the 27th of August 29 Eliz. and upon not guilty it was given in evidence on the defendant's part, that the plaintiff delivered to him a licence to be married, bearing date the 28th of Aug. 29th Eliz. and that he married the plaintiff and his faid wife the fame day, fo as the trespass was before his title to the tythes. And it was holden by the whole Court, that that matter did abate this bill; but it was holden, that if the trespass had been affigned to be committed one day after that, it had been good; but now it is apparent to the Court, that at the time of the trefpass assigned by himself, the plaintist had no title, and therefore the action cannot be maintained upon that action, for which cause the plaintiss was nonsuit. Le. 104. pl. 138. Pasch. 30 Eliz. B. R. Pawlet v. Lawrence.

of St. Thomas, and the lease shewn in evidence was by the master of the house or hospital, and yet well; for the variance is not material; because college and hospital are all one. I Le. 215. Mich 32 & 33 Eliz. 3. C. B. Cheney v. Smith.

17. Assumplit to deliver the plaintist certain monies in London, [ 141 ] when the plaintist delivered to the defendant certain broad cloaths

M A there;

there; upon non assumpsit pleaded the jury found a special verdict, that the affumpfit was, that the plaintiff should deliver certain broad cloth, some of pheasant colour, and the other of other several colours; the Court thought, that the special matter thus found maintained the declaration; and that the defendant ought to have pleaded that the affumpfit was thus special, and traversed the general promise in the declaration. Mo. 460. pl. 659. Pasch. 39 Eliz. 3. Cheney v. Hawes.

18. His freehold must be intended his own freehold, and in his own right, and finding that it was the freehold of the avowant's wife is not fushcient. Cro. El. 524. pl. 52. Mich. 38 & 39 Eliz.

B. R. Bonner v. Walker.

19. If the fuggestion be, that the parson or proprietor of the rectory, and his predecessors had twenty acres of pasture, and twenty acres of wood in fatisfaction of the tythes. If the witnesses prove the twenty acres of pasture, but do not prove the twenty acres of awood, it is proof fufficient. For the substance is proved, that he held land in fatisfaction. Cro. E. 736. pl. 4. Hill. 42 Eliz. B. R. Austen v. Pigot.

20. A. promised B. to pay him for such beasts as 7. S. should buy of him, so much as J. S. should agree to pay for them at any future time. B. fold J. S. feveral beafts partly for ready money, and partly upon truft. This is within the promife. Cro. E. 807.

pl. 9. Hill. 43 Eliz. B. R. Philips v. Turner.

21. In trespass the defendant pleaded a devise to him and his beirs, which being traverfed modo & forma, and iffue hereupon Whitlock v. the will given in evidence devised the lands in this manner, to J. S. for ninety-nine years, and that J. S. shall have all my lands of inberitance if the law will allow it him; and held good, for the law ter, the in- allows it to be a devise in fee. Hob. 2. Hill. 8 Jac. Widlake tent appears v. Harding.

to pass the inheritance; for an estate for life after ninety-nine years is of little value, and could not be intended. Godb. 207. pl. 295. Wedlock v. Harding. S. C. but mentions it as a devife to his coufin Harding for eight years, and also that his cousin Harding should have all my inheritances if the law will; and ad noted per tot. Cur. that this was a devife of the mesuage in see, and that all his other inheritances paled by the faid will by those general words.

> 22. In case against sheriff for an escape, it was found that the party was taken in execution by the former sheriff, and not by defendant, but delivered by him to defendant; yet the imprisonment and escape being found, plaintiff had judgment. Cro. J. 380. pl. 8.

Mich. 13 Jac. B. R. King v. Andrews.

23. If the iffue be whether J. S. was taken by force of cujusdam brevis de capias ad satisfaciendum; a taking by force of an alias cap. is good to maintain this iffue; for alias & pluries are but distinctions of numbers, a capias is the fubstance, and an alias capias with a little addition that might be spared. Hob. 54. Trin, 13 Jac. per Hobart Ch. J. Foster v. Jackson.

24. Yet on this iffue a taking by force of a capias pro fine, or a capias utlagatum with a prayer of the plaintiff to remain in execution for him is not fufficient to maintain the iffue; for though he

Mo. 873. pl. 1218. Hill. 11 Jac. Harding. Upon the whole mat-

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be taken by a capias, and also holden ad satisfaciendum, vet he was not taken by force of a ca. fa. which is a kind of writ cer-

tain. Hob. 55. per Hobart Ch. J. Ibid.

25. But if the iffue had been whether taken by a capias at the fuit of A. a taking by force of a capias at the fuit of B. and then a delivery of a capias at the fuit of A. who thereupon charged him with this fuit, is good evidence to maintain this iffue; for as to this execution it is in law a new taking. Hob. 55. per Hobart Ch. J. Ibid.

26. So it is if it be proved, and found that the defendant cut [ 142 ] down ten asbes; for the very issue in law is waste or no waste, the rest is but certainty of form. Hob. 53. in Case of Foster v.

Jackson.

27. In replevin, the defendant made conusance, for that P. was feifed of fix acres of land, &c. in fee, and granted a rent-charge out of it to (the plaintiff) W. his fon in tail, and for the rent arrear he avowed the taking the cattle, &c. The iffue was, that the rent did not pass by this grant; Hobart said, that the avowant ought to prove, that the grantor was seised of fix acres or more, but not less, as four or five acres, if he would maintain this iffue. Winch. 15. Trin. 19 Jac. Bennett's Cafe.

28. In a replevin, iffue was whether one and all whose estate he had in a manor had used to tether their horses to stakes in a place called B. ab & post festum Pent. annuatim, and the jury found that they had used so to do in vigil. Pentecostes, in festo Pentecostes, die Luna in septimana Pentecostes aut postea ad suam libitum annuatim; and adjudged, that it did not maintain the prescription, because it was more large, and afo gave a choice. Hob. 64. pl. 66. Trin.

22 Jac. Johnson v. Throughgood.

29. In affumplit for 111. lent to the defendant at feveral times, it is no evidence for the defendant, that he owed only 101. for the action being for diverse things the plaintiff shall recover the 101. and be barred for the refidue, otherwise when the contract is entire, and so of an entire affumpsit. Dy. 219. b. pl. 11. marg. cites 3 Car. in Scace. Walter v. Boats.

30. The point in issue was, if J. S. devised lands to J. N. and his heirs or not; the finding a devise to B. for years remainder to J. N. and his heirs is not a finding according to the iffue; for the issue is upon an immediate devise in possession. Jo. 224. pl. 5.

Pasch. 6 Car. King v. Newdigate.

31. In an action of trespass for taking of a stack of corn if the defendant pleads not guilty, and the jury find him guilty of five quarters of grain provenientibus of parcel of the faid stack, it is good evidence, and good verdict. P. 10 Car. B. R. between Anguish and Methold adjudged, it being moved in arrest of judgment. declaration was, that he took unum acervum filiginis Anglice 2 goalfesteade or stack of rye; and the jury as to eight combes, and two bushels filiginis de infrascripto acervo filiginis in narratione specificatos found the defendants guilty, and for the refidue not guilty; and this adjudged good evidence, and a good

verdict, and this afterwards Tr. 11 Car. affirmed in writ of error in the Exchequer-chamber by the whole Court. 2 Roll. 684.

Trial (F. f) pl. 6.

32. Affumpfit was brought for 101. money lent; the defendant pleaded non affumpfit, and the judge admitted him to prove payment before the action brought, which if the defendant can do, then there was no confideration to charge him in this action. Clayt. 71. pl. 123. Aug. 1639. before Vernon and Henden, J. Blefbie's Caie.

33. In an action of waste for cutting and felling of trees upon mullum vastum fecit, if the jury find that he rooted the trees, and d I not cut them, that is a variance. 2 Ro. Ab. 720. cites Trin.

7 Jac. in C. B.

34. Assumptit for the price of a beast, and declares that the agreement to pay so much as the beast should be worth reasonably, and the witness proved the agreement to be that the defendant would give content for it; and this was ruled good evidence to prove the promife laid, and in common fense the words amount to so much. Clayt. 148. pl. 271. Aug. 1650. before Thorpe Judge of Nisi Prius. Bland v. Tenant.

35. An action upon the case was brought against one for nusance in digging a hole in such a way, whereby the plaintiff as he was travelling in that way with his horfe did fall into the faid hole and burt himself, to his damage, &c. To which the defendant pleaded [ 143 ] not guilty, and the plaintiff gave in evidence that one J. S. his fervant was driving his horse in the said way, and for that the defendant had digged the aforefaid hole in the faid way, the plaintiff's horse fell therein, and was spoiled, and rendered thereby unfit for fervice; but held no good evidence to maintain the iffue; Roll Ch. J. held that it ought to find the way and the hole digged, and all the matter conducing to the iffue, and therefore let the verdict be quashed, and a new venire awarded. Sty. 335. Trin. 1652. B. R. Anon.

> 36. If in trefpass defendant in pleading doth entitle himself to a house and land, to hold of the lord according to the custom of his manor, and upon a trial he gives the custom in evidence for the lands only, that will not maintain the iffue. Brown's Anal. 14.

Words im-37. On a declaration, quare defendens crimen feloniæ ei impoporting a fuit, the plaintiff cannot give in evidence words only but acts, as charge of arrefting, charging or convening him before a justice of peace felony will not be proof for felony. Raym. 61. Mich. 14 Car. 2. B. R. Sanders v. of it; but Edwards. there must

be proof of some acts adjudged. Show. 282. Mich. 3 W. & M. Haynes v. Rogers .-

38. If one fail of his proof in the same nature his plea is, it is ill. Heath's Max. 83.

Keb. 787. 39. There is a difference as to the evidence on a declaration pl. 40. Baf- of a trespass quare clausum & alia enormia; for when it arises ex pon S. C. turpi causa, the particular wrong may be given in evidence on and it was fuch a general declaration under the words (alia enormia) because

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the law will not compel the party to shew it on record, but in for entering all other cases the special matter must appear in the declaration, &c. and nor shall any evidence be given of facts that are not in it. alia enor-Sid. 225. pl. 17. Mich. 16 Car. 2. B. R. Sippora v. Baffet.

gave in evi-

dence that the defendant came as fuitor to his daughter for two years and defiled her, and the Court conceived it might be well given in evidence, without faying quod infultum fecit fuper filiam fuam, &c. and so of the wife, and that this is the better way .-

40. At Guildhall in an action for words per quod maritagium amisit, upon evidence the plaintiff proved part of the words only, but proved that by reason of these words maritagium amisit; and ruled by Holt Ch. J to be well enough, for it is sufficient if the plaintiff proves the lofs of marriage by reason of any words in the declaration. Skin. 333. pl. 3. Hill. 4 W. & M. B. R. Geary v. Connop.

41. If a man brings trover for a ship, and upon the evidence Comb. 366. it appears that he has but the fixteenth parth of it; this is good, S. C. acand the interest of the others may be given in evidence in misi and the interest of the others may be given in evidence in mitigation of damages. Skin. 640. pl. 4. Pafch. 8 W. 3. B. R. in

Cafe of Dockwray v. Dickenson.

42. Where the time of payment is past at the time of acceptance of a bill of exchange, the acceptance can be only to pay the money, and if the defendant was so absurd as to promife to pay the money fecundum tenorem bille, yet that is no more in law now than a promife to pay the money generally; but it is better to declare on a general promise to pay the money. I Salk. 127. pl. 8. 10 W. 3. B. R. Jackson v. Pigot.

43. In case for words spoke of a woman, whereby she lost her marriage with J. N. Holt Ch. J. refused to let evidence be given of a lofs of marriage with any body but J. N. 2 Ld. Raym. Rep. 1007. Hill. 2 Ann. at the Sittings in Middlefex. Anon.

44. In case for running over the plaintiff's barge with his ship, Holt Ch. J. would not fuffer any damages to be recovered for the goods, because not set forth particularly, faying, they ought to be fet forth specially; as where an action is brought for burning his [ 144 ] house; so in case for words, per quod she lost her marriage with J. S. & aliis personis, he said he would not suffer them to give in evidence a loss of marriage with any body but J. S. I Salk. 287. pl. 22. Hill. 2 Ann. at Guildhall. Martyn v. Hendrickson

45. In trespals quare clausum fregit in D. if the defendant 6 Mod. 117. pleads liberum tenementum, and issue is thereupon joined, it is Elvis v fufficient for the defendant to shew any close in which is his freehold, but if the plaintiff gives the close a name, he must prove a freehold in the close named. Adjudged in C.B. and affirmed in error in B. R. 2 Salk. 453. pl. 2. Hill. 2 Ann. B. R. Helwis v. Lamb.

46. In local actions as in trespass quare clausum fregit, the plaintiff cannot prove a trespass but where he lays it, nor lay it in any other place than where it is, but it is otherwise in actions transitory, so that a proof of a trover for trees cut down in Ire-

land, is good upon a declaration of trover in Middlesex. I Salk.

290. pl. 29. Trin. 7 Ann. Brown v. Hodges.

47. Assumplit for meat, drink, &c. found by the plaintiff for the defendant, upon evidence it appeared that it was found for the defendant's apprentice and not for himself, and held that the plaintiff could not recover upon this general count. Coram Prat

Ch. J. apud Guildhall. Mich. 5 Geo.

48. Action upon the case plaintist declared that whereas he had put a gelding to the defendant to be depastured, the defendant promised salvo custodiendum to the said gelding, but that he had so inordinately rid the said gelding that by means thereof the gelding died. The Ch. J. was of opinion that the plaintist had not proved the declaration, because he had no evidence that the defendant promised ad salvo enstodiendum eundem, but only that the plaintist put him to the defendant to grass. Coram Prat Ch. J. Hill. 6 Geo. apud Westminster, Ford v. Osborn,

# (D. b) Proof. At what Time it must be.

1. PROOF of the thing for which the affumpsit is made need not be before the action is brought, but may be in the action. Show. 845. cites Grissith's Case.

2. So in debt upon bond not to bunt in a park. Ibid. cites

7 Rep. 2. Fitzh. Barr. 241. per Belknap.

3. 1 W. & M. cap. 16. feet. 2. No evidence of simony shall be given, unless the party supposed to be guilty of it be then living, or were in his life convicted of the said simony at common law, or in some Ecclesiastical Court.

# (E. b) In what Cases new Evidence shall be given.

- 1. I N an attaint the defendant may give new evidence, but not the plaintiff. The reason seems, because the defendant is to defend himself. D. 212. a. pl. 34. Pasch. 4 Eliz. Kent v. Paramor.
- 2. An appeal was from the Master of the Rolls' decree, and it was a question whether new evidence that had arisen between the bearing and decree and the appeal should be received, and it was held per Lord Keeper; Holt Ch. J. and Powel J. that all the matter at the Rolls had fallen to the ground on the appeal, and it was now the same thing as if nothing had ever been done in it, and by consequence the new evidence ought to be admitted.
  6 Mod. 287. Mich. 3 Ann. B. R. per Holt Ch. J. in Case of St. Clement's v. St. Andrew's Parish.

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(F. b) What Evidence the Parties may inforce each other or Strangers to produce; as Court-Rolls, Books of Account, Church-Books, &c.

I. I N an action of false imprisonment against the officers of the Col- Carth. 421. lege of Physicians, the Court will not make a rule for the 491. S. C. plaintiff to inspect their books. Lord Raym. Rep. 253. Mich. S. C.

9 W. 3. Groenoelt v. Barwell.

2. A difference arising between an impropriator and the parishioners concerning the right of an house, he brought an ejectment, and moved, that the church-wardens might shew him the parish-books, and give him copies of what concerns his title, and they might be produced as evidence at the trial; and faid, that fuch copyholders, on fuch motions, have frequently had rules for the steward to grant copies, and that the Court-rolls be produced at the trial; but, per Curiam, this case differs from the case of copyholders, because all the tenants of the manor have an interest in the Court-rolls; but, in the principal case, the impropriator hath a distinct interest from the parishioners; for it was not a parochial right, but a title, which is now in question, and therefore it was not reasonable that the parish books be produced, which would be to shew the defendant's evidence; besides, church-wardens are not a corporation without the parson. 5 Mod. 395. Pasch. 10 W. 3 Cox v. Copping.

3. Ejectment for a house by the impropriator against the church-wardens of the parish of Aldgate; Eyre for the plaintiss moved, that he might have a rule to see the parish-books, upon suggestion that they would make the title appear, and that they were common books belonging to all the parish, and that it did not differ from the cases where a rule is granted for the defendant to see Court rolls and the books of a corporation; but denied per Cursor where the parson claims a distinct interest from that of the parish, it is not reasonable to compel the parish to discover their title by shewing the books, which are kept only for their own use, but the title of the copyholder depends upon the Court-rolls; so of corporation-books, which differ from the present case. I.d.

Raym. Rep. 337. Pafch. 10 Will. 3. Anon.

4. An information was preferred against the defendants being custom-house officers, for forging of a bond supposed to be given by a merchant to the King for his customs. And motion was made on behalf of the prosecutor, to have the custom-house books, in which the entries were made, &c. brought into Court to convict the defendants; but the motion was denied, because the said books are a private concern, in which the prosecutor has no interest, and therefore it would be in effect to compel the defendants to produce evidence against themselves; and the Court never makes such

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rules, but only of records, or deeds of a public nature. Ld. Raym. Rep. 705. Mich. 13 Will. 3. The King v. Worsenham, & al.

5. A rule to produce the cash-book of the India company, and the transfer-book of bank-stock at a trial. 2 Ld. Raym. Rep. 851. Hill.

I Ann. Geery v. Hopkins.

6. The defendant and eight others were incorporated under an act made in the 39 Eliz. by the name of the Surveyors of the highways of Aylefbury in the county of Bucks, and were trustees of a charity called Bedford's gift. An information was preferred against the defendant for executing this office, being an office of trust, without having took the oaths, contrary to 25 Car. 2. to which he pleaded not guilty; and now Mr. Raymond moved for a rule, that the profecutor might have two books produced which these surveyors kept, in which they entered their elections, and also their receipts and disbursements; and that he might take copies of what he thought necessary, and that the books might be produced at the next assizes at the trial; but per Curiam denied, because they are perfectly of a private nature, and it would be to make a man produce evidence against himself in a criminal profecution. 2 Ld.

Raym. Rep. 927. Trin. 2 Ann. The Queen v. Mead.

7. The plaintiff, and likewise the defendant, and several others were part-owners of a ship, and the defendant received several sums of them for the use of the ship, and gave receipts for what he received, and afterwards he laid out the faid fums in the ship and voyage, of which he kept an account, and in which book allowances were made him for what he fo laid out, which book belonged to the plaintiff, and to the defendant, and all the part-owners, but was now in the possession of the plaintiff, who brought an indebitatus assumpfit against the defendant for so much money received to his (the plaintiff's) use; upon affidavit of this matter, the Court was moved, that the plaintiff might produce the book at the trial, or give the defendant copies of what allowances had been made, that he might use it as evidence for him at the trial, but it was denied; 'tis true, if covenant is brought on an indenture, and the defendant fwears he never had a copy, the Court will not compel him to plead till the plaintiff give him a copy; but here the plaintiff should have taken up his note upon his account allowed, and he was trufted with the book by all the parties concerned, and if he breaks his trust, you must seek for remedy in equity. 6 Mod. 264. Mich. 3 Ann. B. R. Ward v. Apprice.

8. On a motion in case for a salse return to a mandamus, that the plaintist might have the sight of the books of the corporation to take copies of them in order to be made use of on the trial (to prove the election of a bailist of Bewdley) a rule was granted for taking copies of any thing relating to the election, but nothing else, for these books are public things, and ought to be seen, and are made use of in this case, and on a quo warranto against the corporation there may be a rule to produce the books themselves. A case was cited, that it had been so ruled in Case of the East-

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India Company, for them to produce their books. On a question between two copyholders, any one of them may move for a rule to have the fight of the books and rolls of the manor. Pasch. 6 Ann. B. R. Slade v. Walter.

9. But on a question between two persons who had a right to the manor, the Court denied a rule to produce the rolls of the manor at the trial, it being out of the common case when it is between two tenants. Pafch. 6 Ann. C. B. Wood v. Whitcomb.

10. N. B. The Court will not order the copy of a charter, nor the charter itself to be produced, because the same is inrolled,

and a copy may be had from the record.

11. On motion by dean and chapter, leave was not given to [ 147 ] inspect books, and papers of the vestry of the parish of St. Margaret Westminster on a question about the right of nominating a clerk of the parish, which was between the parish and the dean and chapter, being but a private thing, and no public concern, but only between private persons as to the right of nomination. Paich. 13 Ann. B. R. Turner v. Gethin.

12. In Case between Dr. Bennet and Inhabitants of Cripple- 2 Sid. 8. gate, the parish-books were admitted as evidence both for the The leidger plaintiffs and defendants, as also books belonging to the dean and wasevidence chapter of St. Paul's, in which were entered leafes made by the to prove predecessors of the lessor vicars of Cripplegate. In this case, right of Court of B. P. ordered plaintiff thould have an infraction of the fishery. Court of B. R. ordered plaintiff should have an inspection of the parish-books and copies of what he pleased. Coram Prat Ch. J. Hill. 5 Geo. apud Guildhall.

13. Rule for defendants to flew cause why an information in nature of a quo warranto should not be exhibited for exercifing the office of bailiffs of Droitwitch, and on motion, it was ordered, that they might have access to the books of the corporation in order to make their defence. Mich. 7 Geo. B. R. The King v. Little-

ton, & al.

14. The Court ordered defendant at plaintiff's expence, to give him a copy of the articles for Epson races, and produce the fame at the trial. Defendant was the stake-holder, and plaintiff, whose horse won the guineas or plate, could not proceed to trial without the articles. Barnes's Notes in C. B. 316. Mich. 8 Geo. 2. Gracewood v. -

15. This was an action brought upon the statute of Annæ, Comyne's against defendant, deputy post-master of Carlisle, for the penalty Rep. 5:6. of 5001. for his perfunding a person to vote at the last election v. Patison of members to ferve in parliament; defendant moved for infpec- S. C. but tion of the corporation-books; per Cur. defendant is laid to be an there the elector, and having a right to vote, he is intitled to inspect the books for the by the act of parliament; to this purpose the books are publick, plaintiff to and therefore let defendant have the inspection of that part of inspect the the corporation-books where the names of the freemen are enrolled, and copies at his own expence. Barnes's Notes in C. B. to be used 154, 155. Trin. 10 Geo. 2. Richards qui tam, &c. v. Pattinson. at the trial, and a rule made accordingly; (Reeve Ch. J. absent) though it was objected, that the plaintiff was no freeman,

and ought not to be admitted to inspect the books to make evidence for his action, nor is here any affidavit, that the right of election is in the freemen; but it was answered, that the plaintiff has a right by being plaintiff in the action to fee what relates to the fact on which the action is grounded.

> 16. Defendant moved for leave to inspect the books of the Conick Lamp-office, and had a rule to shew cause, which was discharged; per Cur. the proprietors of these lamps are not a corporation, their books are not publick, nor do they appear to be trustees for defendant. Barnes's Notes in C. B. 155. Trin. 11 & 12 Geo, 2. Smith v. Huggins.

# [ 148 ] (H. b) In what Cases a Special Matter may be given in Evidence.

1. COMMON, rent-fervice, rent-charge, licence, &c. ought to be pleaded, and not given in evidence upon general iffue, contra of lease of land for years. Br. General Issue, pl. 81. cites 25 H. 8.

2. If a villein pleads frank, and of frank-estate he may give manumifion in evidence; for this is manumifion in fact. Br. General

Iffue, pl. 82. cites 25 H. 8.

3. But where he is manumitted by act in law, as fuit taken against him by his lord, or obligation made to him by the lord, or leafe for years, &c. for these are manumissions in law, of which the jury cannot discuss, and therefore shall be pleaded. Br. Ibid.

4. In trespass for breaking his close and beating his servant, and carrying away of his goods. Upon not guilty pleaded, the jury found this special matter; scil. That Sir T. B. was seised of the land, where, &c. and leased the same to the plaintiff and one A. which A. affigned his moiety to C. by whose commandment the defendant entered. It was moved that that tenancy in common betwixt the plaintiff and him, in whose right the defendant justified, could not be given in evidence; and fo it could not be found by verdict, but it ought to have been pleaded at the beginning. But the whole Court was clear of another opinion, and that the same might be given in evidence well enough. 3 Leon. 83 and 94, pl. 123. and 137. Mich. 26 Eliz. B. R. Rose's Case.

5. Whenfoever a man cannot take advantage of the special matter by way of pleading, there he shall take advantage of it in the evidence. For example, the rule of law is that a man cannot justify in the killing or death of a man, and therefore in that case he shall be received to give the special matter in evidence, as that it was fe defendendo, or in defence of his house in the night

against thieves and robbers, &c. Co. Litt. 283. a.

6. In any action upon the case, trespass, battery, or of false imprisonment against any justice of peace, mayor or bailiff of city or town corporate, headborough, portreve, constable, tithingman, collector of fubfidy or fifteenth in any of his Majesty's Courts at Westminster, or elsewhere, concerning any thing by

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any of them done, by reason of any of their offices aforesaid, and all other in their aid or affiftance or by their commandment, &c. they may plead the general iffue, and give the special matter for their excuse or justification in evidence. Co. Litt. 283.

7. A defendant cannot in any action upon not guilty pleaded, give in evidence a licence, but he may give a gift in evidence.

Brown's Anal. 15.

8. In an action of trespass, where the defendant pleads not guilty, and makes title by a stranger, it is no evidence to fay, that he committed the trespass by the commandment of the franger, but ought to plead the fame, as he must do the licence of the plaintist himself. Ibid.

9. If the defendant pleads nil debet to an action of debt upon a contract, he may give in evidence, that the contract was conditional, or he may plead the fame without traverse. Ibid.

10. The like upon non affumpfit pleaded to an action upon

the cafe.

11. Upon the plea of non definet, the defendant cannot give

in evidence a mortgage. Brown's Anal. 15.

12. Neither can the defendant upon fuch issue give in evi- [ 149 ] dence, that he had the thing of the plaintiff as a pledge for money not yet paid. Brown's Anal. 16.

13. In debt upon an escape, if the defendant plead no escape made, he cannot give in evidence no arrest. Brown's Anal. 16.

- 14. Upon the iffue non diminit to an action of debt for rent upon a lease-parol, the plaintiff cannot give in evidence a lease by deed, but he may give a leafe conditional, as an agreement conditional in evidence. Br. Anal. 16.
- 16. Upon non est factum pleaded generally the defendant may give in evidence, that the plaintiff afterwards pulled the feal off from the deed; dubitatur. Brown's Anal. 16.

17. But upon non est factum pleaded generally the defendant may give in evidence minime literatus. Brown's Anal. 16.

18. The like upon delivery of the deed as an eferow. Brown's Anal. 16.

19. Debt for the arrears of rent upon leafe for years; upon nil debet per patriam pleaded, it is good evidence to prove quod non dimisit. Brown's Anal. 16.

20. Debt for the fale of a horse for 40 s. the defendant may plead nil debet, and give in evidence, that the fale was of two horses for 40s. or of an ox for 40s. and good. Brown's Anal. 16.

21. Trespass for taking of gosbawks, not guilty pleaded, and evidence given, that the defendant has a lease of the woods where the hawks were taken, and good, because he thereby makes a title to himfelf. Brown's Anal. r6.

22. In trespass not guilty is pleaded, and the defendant gives in evidence a leafe for years, and good, but fecus of a leafe at will, because that is determinable at pleasure. Brown's Anal. 17.

23. In trespass de boms captis, the desendant pleads non culp. Vol. XII.

and gives in evidence, that he recovered the fame goods by verdia, and had them delivered to him in execution, and good. Brown's Anal. 17.

24. In trespass, and not guilty pleaded, the evidence was, that the property was to J. S. who gave them to the defendant,

and good. Brown's Anal. 17.

25. But in trespass, where not guilty was pleaded, the evidence was, that the property was to J. S. and that the defendant as his fervant, and by his commandment took the goods in the count and ill; for he thereby confesseth the trespass, and yet justifies the same. Brown's Anal. 17.

26. In trespass, not guilty was pleaded, the evidence was, that locus in quo, Sc. fuit liberum tenementum J. S. who licensed the defendant to enter, by virtue whereof he entered accordingly; but no good evidence, because it is a justification. Brown's

Anal. 17.

27. In trespass of battery, and not guilty pleaded, the evidence was, that the battery was done in the defendants own de-

fence, and ill. Brown's Anal. 17.

28. In covenant the issue was, whether the defendant had made an estate sufficient in Black Acre to the plaintiff or not, and the evidence was, that the estate was not of such a value, and ill, for it is not answerable to the matter in issue. Brown's Anal. 17.

20. Debt upon an obligation for letting one go at large upon a mainprise, and doth not say the plaintiss sheriss, the defendant may plead specially, and so conclude his plea by way of non est factum, but cannot plead non est factum generally, because con-

trariant. Brown's Anal. 17.

30. In trespass quare clausum fregit, it is a plea in abatement to fay that the plaintiff is tenant in common with another, but cannot be given in evidence upon not guilty, as it may where one tenant in common brings trespass against the other. Vent. 214. Trin. 24 Car. 2. B. R. Anon.

31. In replevin upon non cepit pleaded, property cannot be given in evidence. Per Hale. Vent. 249. Mich. 25 Car. 2. B. R.

in Case of Wildman v. Norton.

Yet this

32. In debt against lesse, he may plead nil debet, and give swered by the expulsion in evidence. Vent. 258. Pasch. 26 Car. 2. B. R. proving that Anon.

this was by the leafe of the leffee. Vent. 277. Mich. 27 Car. 2. B. R. Per Hale Ch. J. in Cafe of Hodg-

kins v. Robson and Thornborough.

33. In an assumpsit for money upon a sale of goods, defendant pleads non assumpsit; he may give in evidence an eviction of the goods to mitigate the damages. Per Hale Vent. 267. Hill.

26 & 27 Car. 2. B. R. Anon.

34. If a citizen is chosen sheriff of London, and the mayor and aldermen refuse a reasonable excuse, the party is not bound by such resusal, because he may give it in evidence upon nil debet pleaded in an action of debt brought for the forsciture, and there the validity

12 Mod. 272. S. P. per Holt Ch. J in

[ 150 ]

lidity of the excuse will be tried by a jury. Carth 483. Pasch. Raym Rep. II W. 3. B. R. Per Holt Ch. J. in the Case of London City in S. S. P. v. Vanacker.

Per Holt

Ch. J .- 5 Mod. 442. S. C and F.P .-

35. Trover by administrator on the intestate's possession, defendant cannot give in evidence a will on the general isfue, otherwise if on administrator's own possession. 1 Salk. 285. pl. 17. Mich. 1 Ann. coram Holt Ch. J. at Nisi Prius. Blainfield v. March.

36. One jointenant, or tenant in common, or partner cannot bring trover, and if he does, 'tis good evidence on the general issue of not guilty. But if one jointenant brings trover against a stranger, in that case the defendant may plead it in abatement, but cannot take advantage of it in evidence. I Salk. 290. pl. 29. Trin. 7 Ann. B. R. Brown v. Hedges.

## In Account.

1. Debt upon arrears of account, the defendant said that he owed Brown's him nothing & forma, and gave in evidence, that there was no fuch S. P. account; and Newton faid for law, that the evidence is good, and also he may say in evidence if there was account, that yet he owes him nothing, and yet he might have faid for plea, no fuch account. Br. General Issue, pl. 7. cites 20 H. 6. 24.

2. In debt upon account before auditors, the defendant may plead Brown's nihil debet, and give in evidence that no fuch account. Br. General S. P.

Issue, pl. 39. cites 9 H. 7. 3. Per Fineux.

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3. And in debt upon a lease for years, if the defendant pleads nihil debet, he may give in evidence that non dimifit prout, &c. Quære inde. Ibid.

### In Annuity.

1. In scire facias of annuity against a parson, if he pleads that not parson, he may give in evidence resignation, and the jury is bound to find it. Br. General Issue, pl. 62. cites 9 E. 4. 49.

### In Appeal.

[ 151 ]

1. He who pleads not guilty in appeal, cannot give in evidence that he was sheriff and hanged him. Br. General Issue, pl. 46. cites 12 H. 81.

2. Or that he was a forester and killed him flying. Ibid.

### In Affets.

1. Debt against executors, if they are at iffue upon affets enter mains, it is good evidence that they have fold the land by the will of the testator, and have the money. Br. General Issue, pl. 4. cites 3 H. 6. 3.

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2. So

2. So that they have recovered in trespass of goods taken in the life of the teflator. Ibid.

3. So in debt of Iol. to prove that they have to the value of 401.

### In Bastardy.

Br. Villeinage, pl. 20. S. C.

1. Bastardy was pleaded in the plaintiff in whom the defendant had pleaded villeinage, and the defendant faid, that the espoulals were at D. &c. which continued all their lives, within which time the plaintiff was born, & non allocatur, by which he concluded over, and so mulier and not bastard, and prayed that all be entered & non allocatur; for nothing was entered but mulier and not baffard. Br. General Issue, pl. 13. cites 19 H. 6. 17.

2. In affife of mortdancestor, the tenant said, that he was ready to bear the recognizance, and in evidence would have baftardized the plaintiff, and was not suffered; for he has pleaded against him as mulier; but the affife was charged upon all the points of the writ, but in this case the tenant cannot bastardize him; and so fee that it ought to have been pleaded. Br. General Issue, pl. 34-

cites 12 Aff. 3.

### As to Common,

1. In affife by commoner, where the lord has approved, and the plaintiff bas common to land in this will, and in another will he shall take the first will for plea, that he has twenty acres there, and by protestation that he has forty acres in another will to which he has common here, and join iffue upon the infufficiency of the common, and give the matter in evidence that he has common appendant there to his land in several vills. Br. General Isiue, pl. 83. cites 16 E. 3. and Fitzh. Common, 9.

2. In trespass the issue was upon prescription to common with so many beafts time out of mind, and gave in evidence common for caufe of vicinage; and it was held no evidence; for the iffue shall be intended by prescription only, and the evidence is prescription and confideration that the one shall have common with the other. Br. General

Isiue, pl. 96. cites 13 H. 7. 13.

3. In action on the case for disturbing the plaintiff in enjoyment of his common, the defendant may plead the general issue, and give the special matter in evidence. 8 Mod. 120, 121. Hill. 9 Geo. 1. Moste v. Bennet.

#### In Debt.

Br. Dette. pl. 112. eiter S. C.

1. A servant is retained taking yearly 20s. or a robe of the price of 20s. which is arrear, the defendant faid, that be has paid the robe yearly at D. in the county of S. &c. And per Moyle he shall [ 152 ] fay nil debet, and give the special matter in evidence; for it amounts to non debet, &c. Br. General Islue, pl. 27. cites 9 E. 4. 36.

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2. But where the payment is of another thing than of money the Br. Dette. plea is good, and he thall not be compelled to the general iffue; pl. cites S. per Littleton, Choke and Needham J. Ibid.

3. And the defendant may plead, that the plaintiff departed out of Br. Dette. bis fervice, and shall not be drove to the general issue, quod nota pl. 112. cites S. C.

bene. Ibid.

## In Debt against Corporation.

1. In debt against an abbot a man may count generally, that the Br. Abbe. 101. borrowed came to the use of the house, and shew in evidence pl. 9. cites how, as in buying of bread and beer, or in defence of a suit against the abbot, or en reparations, &c. Br. General Issue, pl. 21. cites 22 H. 6. 56.

In Debt against Executors.

1. In debt against J. S. executor of the testament of W. if he imparles, he cannot plead to the writ that he is administrator, and not executor, and therefore by advice of the Court he pleaded ne unques administered as executor, and give in evidence, that he was administrator, and not executor; per Cur. quod nota. Br. General Isiue, pl. 61. cites 9 E. 4. 4.

2. In debt against executors who plead ne unques executor, &c. or riens enter-mains, upon which they are at issue upon affects; or that administraverunt, &c. and do not shew what they administered, or what are the affects; yet it is good; for it shall be given in evi-

dence. Br. General Ifiue, pl. 87. cites 9 H. 7. 14.

#### In Detinue.

1. Detinue of a voriting by which J. M. abbot of C. and the covent granted a corody and pension of 31. per ann. and the office of portership of the said abbey to W. S. for term of his life, who granted it over to the plaintiff and the first deed also, I factum illud detinet, &c. The defendant pleaded non detinet, and the jury found that he sold as above, &c. but it was agreed between them that the defendant should retain the deed till 401. was paid, of which 71. is paid, and not the rest, therefore detinet, &c. Per Danby, this matter is a good bar, and ought to have been pleaded, and otherwise he shall not take thereof advantage, by which the plaintist recovered by award. Br. Detinue, pl. 19. cites 22 H. 6. 33.

2. And in detinue if the defendant pleads non detinet, and it is found that it was delivered in mortgage, the plaintiff shall recover;

for this ought to have been pleaded. Ibid.

3. If a man bails goods to J. S. and after buys a borfe of J. S. and agrees that he shall have the goods bailed for the horse, and after he brings detinue of the goods bailed, and he plead non detinet; and all found as above, the plaintiff shall recover, because the matter was not pleaded. Ibid.

### In Dower.

Br. Dower, pl. 54 cites S. C. 1. The tenant said, that the seme had an elder baron than he of whose downent she now claims, which elder baron is yet in sull life, et non allocatur, by which he added to it, and so ne unques accouple in lawful matrimony, and nothing was entered but ne unques accouple, &c. and writ awarded to the bishop to certify it, and this matter shall be evidence before the bishop, &c. Br. General Issue, pl. 29 cites 39 E. 3. 15.

[ 153 ]

2. In dower-of rent, the defendant said, that the baron had nothing in it, unless jointly with J. S. who is yet alive; the feme replied, that J. S. released to her bar on all his right, &c. Thirn. asked where the release was? Skrene said, It does not belong to us; per Thirn. it is better for you to say that seise que dower la poit, and give the release in evidence, quod tota Curia concessit, by which Skrene took issue accordingly. Br. General Issue, pl. 48. cites 11 H. 4.83.

3. In dower of rent, Hill said, ne unque seise que dower la poit, Horton said, J. S. granted the rent to the baron payable at Michaelmas next, and before the day the baron died, and so was he seised in law, and demanded judgment; Thirn. bid him say generally, that seise que dower la poit, and give your case in evidence, and so well notwithstanding the doubt of the lay gents; for they ought to credit the law. Br. General Issue, pl. 49. cites 11 H. 4. 88.

4. In dower, the tenant said, that S. was seised in see, and in-feoffed him in see, and after he leased to the baron to hold at the will of the lessor now tenant, which estate he continued all his life, absque hoc that he was seised of such estate que dower la poet; and all this matter entered on the roll, and not only the general issue, by reason of the long continuance of possession for doubt of the intelligence of

the lay gents. Br, General Issue, pl. 33. cites 39 H. 6. 9.

5. In dower, the tenant demanded the view, the demandant said, that the view he ought not to have; for our baron died; the defendant rejoined, that her baron did not die seised of such estate that she might have dower, Prist, and the tenant e contra, but the Court and the prothonotaries doubted of this issue, and the next day Starkey said, that the baron died seised of the special tail. Per Cur. you shall not have this by plea, but shall give it in evidence; for the course of the entry is that the baron died seised, and this seems to be in such estate que dower la poet, and the others e contra; for otherwise this cannot come in evidence. Br. General Issue, pl. 47. cites 21 E. 4. 22.

## False Imprisonment.

1. In false imprisonment, if the desendant had arrested the plaintist, and justifies by warrant of the peace which came to him after the arrest made there, the plaintist may say, that de son tort demesse absque hoc, that he had any warrant, and shall give the matter in evidence. Br. General Issue, pl. 23. cites 14 H. 8. 16.

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2. In false imprisonment, the defendant said, that his master imprisoned the plaintiff in a chamber and locked the door, and delivered the defendant the key to keep, which he did, and because the plaintiff was clerk of the Court he was drove to the general iffue, and gave the matter in evidence, scil. the cause of the imprisonment. Br. General Issue, pl. 78. cites 22 E. 4. 45.

### Grant.

I. In second deliverance the defendant avoived for damage feafant, because A. leased to B. for twenty years, and B. granted to him his term, and the beafts were damage feafant, &c. The plaintiff faid, that fuch a day B. granted the term to him absque hoc that he granted to the defendant before the grant made to the plaintiff, and so to iffue, and the plaintiff at the nifi prius gave in evidence a grant upon condition that if he should obtain the favour of the lessor, and pay so much as J. N. Shall fay, and that he obtained the favour of the leffor, and pay 31. as 7. N. awarded, &c. and good evidence, notwithstanding that the defendant faid, that mefne between his grant and the performance of the condition, the leffor faid to this defendant that he never [ 154 ] gave his favour to the plaintiff, and yet good, because when the plaintiff came to him he gave to him his favour, quod nota, and fo well for the part of the plaintiff. Br. Gen. Islue, pl. 24. cites 14 H. 8. 17.

Hors de son Fee.

1. If a man pleads hors de son fee, the other shall not shew tenure, and so within his fee, but shall fay that within his fee, Prist only, and shall give the matter in evidence. Br. General Isfue, pl. 70. cites 10 E. 4. 10.

### Maintenance.

1. In maintenance the defendant tendered justification that is no maintenance; that is to fay, that he, at the prayer of the party for whom, &c. gave him counsel to sue supersedeas, &c. which is no maintenance, therefore not guilty shall be entered, and the matter shall be given in evidence. Br. General Issue, pl. 20. cites 22 H. 6. 35.

2. He who pleads not guilty in maintenance, cannot give lawful maintenance in evidence. Br. General Issue, pl. 46. cites

12 H. 8. 1.

### Non est Factum.

1. In debt, per Broke J. where I deliver a deed to J. N. as an escrowe upon certain conditions performed, to deliver over as my deed, and he delivers it over, the conditions not performed, I may fay non est factum, and give the matter in evidence. Br. General Issue, pl. 25. cites 14 H. 8. 28.

2. In debt upon an obligation the defendant may plead non eft fac-N 4 tum, tum, and give in evidence that he is lay, and not letter'd, and that it was read to him in enother form, and so he did, quod nota. Br.

General Issue, pl. 22. cites 15 E. 4. per Brian.

3. Where a man pleads that he was a layman, and not letter'd, in avoidance of a deed, and that it was otherwise read to him, &c. and so non est factum, there all shall be entered; and yet he may say non est factum, and give the matter in evidence, but the other form is better for the intelligence of the lay gents. Br. General Issue, pl. 33. cites 39 H. 6. 9.

4. In trespass, where a lease by deed of master and confreres is pleaded, it is only argument to say that there were no confreres at the time of the making. Br. General Issue, pl. 41. cites

11 E. 4. 4.

5 So where a deed of the father is pleaded, to fay that he had no fuch father; for he shall say non est factum, and shall give the

matter in evidence. Ibid.

6. Where a deed is pleaded in bar, the other fays riens passa by the deed, he may give in his evidence that not his deed; per Brian, but he said at another time in the same term, that he shall not give in evidence that not his deed; for when he pleads that riens passa, we then it is not denied but that it is his deed, but riens passa by it, and per Keble, he shall give it in evidence, therefore quære, for it shall not. Br. General Issue, pl. 38. cites 5 H. 7. 8.

### Rent. Affife.

1. In affife of rent if nul tort is pleaded, the plaintiff may give in evidence a grant of the rent in another county, and diffeifin in this county. Br. General Issue, pl. 62. cites 9 E. 4. 49.

# [ 155 ]

# Receipt, and Counter-Plea.

1. In precipe quod reddat, if J. N. prays to be received upon default of the tenant for life, the demandant may counterplead that nothing in reversion, without shewing how the reversion was destroyed, but shall give this in evidence; for a stranger had title to enter, and entered, but it is not expressly ruled, but taken de gree. Br. General Islue, pl. 57. cites 8 H. 6. 16.

# Rent. Avowry.

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1. Avowry for rent, and that the tenant held by fealty and rent, and for the rent arrear, &c. and the plaintiff faid that hors de fon fee, and the others contra, and the defendant gave in evidence a deed before time of memory, and feisin of the rent; and per Cur. this does not prove the issue. Br. General Issue, pl. 2. cites 27 H. 8. 20.

2. By which he gave in evidence seisin of the suit of Court; for seisin of the rent is not seisin of the services; and per Fitzherbert clearly, he shall not give it in evidence, because in his avowry

he does not alledge other tenure but of fealty and rent only, quod nota; and feifin of the rent is not feifin of the featty. Ibid.

### Rent. Replevin.

1. Replevin of a forw and pigs, the defendant justified for the forw. and to the pigs faid ne prist pas; and it was found by the jury, that the fow was with pig at the time of the taking, and after farrowed her pigs and well, and the plaintiff recovered; and fo it feems that this matter was given in evidence, and therefore this is a special taking in law. Br. General Islue, pl. 88. cites 18 E. 3. and Fitzh. Replevin, 34.

### Statutes Penal.

1. In debt upon the flatute of farins, 21 H. 8. cap. 13. if the defendant says, that non habuit nec tenuit ad firmam contra formam Statuti, &c. he may give in evidence that he took it in maintenance of his house by the proviso in the statute; per Fitzherbert and Shelley J. But Baldwin Ch. J. denied it, and faid, that he shall plead Quære. Br. General Islue, pl. 2. cites 27 H. 8. 20.

### Tenure.

1. In rescous, if the plaintiff counts of tenure by homage, fealty, and escuage, and he distrained for the rent-arrear, and the defendant made rescous, and the defendant pleads not guilty, he shall not give in evidence that there was no fuch tenure. Br. General Isfue, pl. 93. cites 9 H. 7. 3.

2. And he who pleads riens arrear in avowry does not deny the tenure, and therefore shall be pleaded, and not given in evi-

dence. Ibid.

## Trespass of Battery.

1. Tresposs of battery and wounding, the defendant pleaded not guilty, and the plaintiff gave in evidence to the jury that he was maihem'd at this time, and the jury find it accordingly to the damages of 18 %. and the justices upon view of the maihem gave judgment of the 181. and 221. more, scil. 401. in all. Br. [ 156 ] General Issue, pl. 30. cites 39 E. 3. 20.

2. In trespass of battery, if the defendant pleads not guilty, and it is found that it was of the affault of the plaintiff, and in defence of the defendant, the plaintiff shall recover; for it ought to have been pleaded. Br. General Issue, pl. 19. cites

22 H. 6. 33.

3. He who pleads not guilty in trespass of battery cannot Kitch. 240. give se defendendo in evidence. Br. General Issue, pl. 46. cites 12 H. 8. 1.

11 H. 4. fol. 63.

## Trespass of Closes, &c. Broken, &c.

t. Trespass of close broken in C. the defendant justified in K. absque hoc that he is guilty of any trespass in C. and had the plea by award, and was not drove to the general issue not guilty in C. and to have the matter in evidence, but the plaintiss was forced to reply that guilty in C. prout, &c. quod nota, per Cur. Br. General Issue, pl. 26. cites 4 H. 6. 13.

2. Trespass in D. in the county of N. of trespass local the defendant justified at D. in the county of L. absque hoc that he is guilty at D. in the county of N. and was not suffered to have any thing entered but the general issue, and to give in evidence that the trespass was in another county. Br. General Issue,

pl, 52. cites 9 H. 6. 62.

Kitch. 227.

3. In trespass of breaking his house, if the defendant says that there is no house there, this is no plea; but he may say not guilty, and shew this in evidence that there is no house there. Br. General

Issue, pl. 59. cites 22 H. 6.

4. In trespass against two, if the one justifies for the land, and the other says, that he came in aid of him, to put the beasts of the other defendant into the land of the same defendant, this is no trespass to the plaintiss, by which he pleaded not guilty, and gave the matter in evidence. Br. General Issue, pl. 60, cites 22 H. 6. 36.

5. In trespass in a free warren, it is no plea that it is the frank tenement of W. N. who commanded him to enter, &c. for it is only argument, by which he said, absque hoc, that the plaintiff has warren there, &c. by which he had nothing entered but the general issue. Br. General Issue, pl. 53. cites 34 H. 6. 43.

6. In trespass against a commoner, he ought to justify, and cannot say not guilty, and give this in evidence. Br. General Issue,

pl. 53. cites 38 H. 6. 43.

7. In trespass upon 5 R. 2. of a house and shop, it is no plea that the shop is parcel of the house. Br. General Issue, pl. 67. cites 3 E. 4. 28.

8. Nor of fuch action in D. and S. to fay that all is in D. Ibid.

9. Nor of the manor of D. in S. to fay that twenty acres extend into T. but shall have the general issue, and shall give the matter in evidence; for the plaintiff in those shall recover only damages. Ibid.

10. But those are good pleas in affise and precipe quod reddat, where the land itself shall be recovered. Ibid. and cites

4 E. 4. 31. and 10 E. 4. 11. accordingly.

11. In trespess of entry ubi ingressus non datur per legem by a prior, it is a good plea that the plaintiff was not prior at the time, &c. and so in action brought by warden, sheriff, or master of the prison of his servant, it is a good plea that he was not warden, sheriff, or servant at the time, and shall not be compelled to plead not guilty,

guilty, and give this matter in evidence. Br. General Issue,

pl. 42. cites 12 E. 4. 7.

12. If my wife or servant without my notice puts my cattle into another's land, who brings trespass against me for the eating his grass, if I plead not guilty, I cannot give the special matter in evidence, because it is contrary to the issue; per Keble. Keilw. [ 157 ] 3. b. pl. 7. Mich. 12 H. 7. Anon.

13. In trespass upon not guilty, licence cannot be given in evi- Br. General

dence. Br. General Issue, pl. 46. cites 12 H. 8. 1.

14. Upon not guilty in trespass, lease cannot be given in evi- Br. General dence. Br. General Issue, pl. 46. cites 12 H. 8. 1.

15. Upon not guilty of goods taken in trespass, a gift is good cites S. C. dence. Br. General Issue, pl. 46. cites 72 U.S.

evidence. Br. General Issue, pl. 46. cites 12 H. 8. 1.

16. In trespass, if the defendant pleaded not guilty, he cannot Kitch. 240. give in evidence the hedge of the plaintiff, which the same plaintiff cites S. C. that it is not ought to inclose, was open, and the beasts of the defendant entered, &c. good; for it For this ought to have been pleaded; for it is matter of bar, and also is contrary confesses the trespass, and proves a justification which is not pleaded, tonotguilty, and therefore it is lost. Br. General Islue, pl. 1. cites 19 H. 8. 6. tification.

17. In trespass, if a man entitles a stranger, and justifies by his Kitch. 240, command, this ought to be pleaded, and not given in evidence upon nul cites S. C. tort, or not guilty pleaded. Br. General Isfue, pl. 81. cites 25 H. 8. Anal. 15.

cites S. C.

S. C. cited

by Vaughan Ch. J. Freem. Rep. 44, pl. 52. in Case of Fox v. Grundie.

18. In trespass upon not guilty, the defendant may give a lease for years in evidence. Br. General Iffue, pl. 82. cites 25 H. 8.

19. Contra of a lease at will; for this is a licence, which may be countermanded or determined at pleasure. Ibid.

# Trespass of Goods carried away.

1. In trespass of goods carried away the defendant justify'd, because J. N. was possessed, and gave to the defendant, by which he took them, absque hoc, that he took any goods of the plaintiff; and per Cur. nothing shall be entered but not guilty, and the matter shall be in evidence. Br. General Issue, pl. 5. cites 5 H. 6. 11.

2. Trespass in D. of fish taken the defendant justify'd by common of pischary in the same place appendant to his frank-tenement in B. to the middle of the fream, which fream extends between B. and D. and so he justify'd in B. absque boc, that he is guilty in D. and nothing was entered but not guilty, and yet per Cur. they may fuffer all to be entered, so that it is at their discretion. Br. General Issue, pl. 32. cites 14 H. 6, 23.

3. In trespass de bonis, &c. it is no plea that the plaintiff had no goods, for it is only argument. Br. General Issue, pl. 53. cites

34 H. 6. 43.

4. Trespass of taking of hawks, the defendant pleaded not guilty, the defendant gave in evidence that the plaintiff leafed to him the awood for twenty years, and during the term the hawks bred in the wood.

wood, and he took them, and good evidence, and so the leffee shall have the hawks, quare if the trees were reserved as in 14 H. 8. Br. General Issue, pl. 43. cites 16 E. 4. 1.

Ebidence.

### Wafte.

Br. General

1. Waste in cutting of trees, the defendant pleaded no waste done, listing, pl. 20. and gave in evidence, that the plaintiff leased to him, and granted to co. Litt. cut trees for reparations, and that the house was ruinous at the time of a83. a. S. the demise, and he cut for reparations, and the plaintiff demurred, P. and cites S. C. and and recovered per judicium. Br. General Issue, pl. 46. cites says that he 12 H. 8. I.

cannot give in evidence juftifiable watte, as to repair the house, &c.

[ 158 ] 2. Upon no waste done pleaded, he may give in evidence, that Co. Litt. the house was burnt by enemies or thunder, or that it was ruinous at 293. 2. S. P. and cites Enemal Issue, pl. 46. cites 12 H. 8. 1.

3. Waste was assigned in boscis, viz. in succidendo wendendo ten oaks, &c. whereas he had only lopped and shred them. It seemed that as the waste is assigned, the defendant may safely plead nul waste done, and give the special matter in evidence. D. 92. a.

pl. 16. Mich. 1 Mar. Anon.

4. Waste was assigned in digging fossam in quodam prato. The defendant pleaded nul waste done. It was found by special verdict that the defendant made a trench to carry off the water, per quod pratum melioratur & non pejoratur. It was argued that this matter ought to have been pleaded in bar, but the opinion of the Court was, that it was not any waste. D. 361. b. pl. 12. Hill. 20 Eliz. Altman's Case.

It should be 5. If one does waste, and before the action brought, the lesse repleaded in bar; for by paireth it, and after the lessor bringeth an action of waste, and the such evilustic pleads quod non fecit vastum, he cannot give in evidence the dence it is special matter. Co. Litt. 283. a. in principio.

that there was a waste done at the time. D. 176. a. pl. 51. Trin. 10 Eliz. Anon.

# (I. b) Evidence. What may be given in Evidence in Mitigation of Damages.

1. UPON not guilty pleaded, the defendant may give in evidence, that a shop is parcel of the house. Heath's Max. 78.

cites 3 Ed. 4. Bro. (General Iffue) 67.

2. So upon this plea the defendant may give in evidence a lease; but not a lease at will no more than a licence. Heath's Max. 78. cites 14 H. 3. 16 Ed. 4. 1. 25 H. 8. Bro. (General Issue) 82.

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3. Where the law is, that in trespass of goods taken the plaintiff S. P. For it Shall recover the value of the goods there; per Culp. if the plaintiff the plaintiff has not his re-has his goods, and yet proceeds in his action, the defendant shall goods again give this in evidence, that the plaintiff re-had them to ease him of the plaintiff the damages. Br. General Issue, pl. 11. cites 11 H. 4. 24.

the value of

the goods, but if he has them again he shall not recover damages but for the taking, and detinue quousque querens rehabeat, &c. and all this shall come in evidence, quod nota. Br General Issue, pl. 15. cites 19 H. 6. 34. But the defendant shall not plead to the writ that the plaintiff had his goods again, quod nota bene. Br. General Issue, pl. 15. cites 19 H. 6. 34.

4. So in waste he cannot upon nul waste fait pleaded give in Br. General evidence that he cut the timber for reparations. But in waste he cites S. C. may give in evidence that the premisses were ruinous at that time, or burned by enemies or the like. Heath's Max. 78. cites 12 H. 8. 1.

5. But title in an estranger upon such a plea, and to justify by his commandment, is no evidence, but ought to plead the faid answer, as the licence of the plaintiff himself (as it seems) or one who pretendeth common, &c. Heath's Max. 78. cites 25 H. 8. Bro. 84.

6. In a replevin, the parties were at iffue upon the property, and it was found for the plaintiff, and damages entire were affelfed, and not for the taking by itself, and for the value of the cattle by themselves, for the judgment upon that is absolute and not conditional; and also if the plaintiff had the cattle, the defendant might have given the fame in evidence to the jury, and then they would have affeffed damages accordingly, viz. but for the taking. [ 159 ] Godb. 98. pl. 111. Mich. 28 & 29 Eliz. C. B. Anon.

7. In trespass for taking away the plaintiff's goods, it will be good evidence for the abridgment of damages to prove that the

plaintiff had part of his goods again. Brown's Anal. 15.

8. But if the defendant pretend an interest from a stranger in the land itself, although but an effate at will; yet he may plead not

guilty. Heath's Max. 78.

9. In evidence to a jury in action upon the cafe against one convicted of perjury and pardoned, to recover damages only; the former conviction, by Foster and Windham may, notwithstanding the pardon be given in evidence being collateral; as in calling one thief, after pardon his former ill-conversation may be given in evidence in mitigation of damages, which Twifden denied; for he may falfify or traverse it in this collateral action; but by the rest, though it be not conclusive, yet it is good evidence to induce belief. 1 Keb. 286. pl. 95. Pafch. 14 Car. 2. B. R. Howard v. Golding-Prentice.

10. It was held by the Court that in affumplit in fact on a non affumpfit pleaded, a release cannot be given in evidence to take away the assumplit, but only in mitigation of damages; but on affumpfit in law and a non affumpfit pleaded it may, because it takes away the affumplit. Quære, fays the Reporter, if an af-

fumplit either in fact or law, on a non affumplit pleaded, pers formance can be given in evidence. Sid. 236. pl. 3. Hill. 16 &

17 Car. 2. B. R. Beckford v. Clark.

11. In an affumpfit in confideration of the marriage of his daughter, on non affumpfit pleaded, exoneravit cannot be given in evidence to discharge the promise but only in mitigation of damages; but it ought to be pleaded; per Hale. 2 Lev. 81. Hill. 24 & 25 Car. 2. B. R. Abbot v. Chapman.

Comb. 326. S. C. accordingly.

12. If a man bring trover for a ship, and upon the evidence it appears that he has but the fixteenth part of it, this is good, and the interest of the others may be given in evidence in mitigation of damages. Skin. 640. pl. 4. Pasch. 8 W. 3. B. R. Dockwray v. Dickenson.

13. License by husband to wife to lie with another man cannot be pleaded in bar to an action of trespass by husband, nor that she was a notorious lewd woman, but the matters may be given in mitigation of damages. 12 Mod. 232. Mich. 10 W. 3. Coot v.

Berty.

14. Though an executor, de fon fort pays debts duly with all the affets that come into his hands, yet the rightful executor shall maintain trespass against him, but he may give such payment in mitigation of damages; yet the right of the action and verdict shall go against him. Per Holt Ch. J. 12 Mod. 441. Hill.

12 W. 3. Anon.

15. In case for words, which imported the committing of adultery by the plaintiff with Jane at Stile, the defendant in mitigation of damages may give in evidence that the plaintiff committed adultery with Jane at Stile, but not, that he committed adultery with any other woman. Per Holt Ch. J. at Brentwood fummer affizes 13 Will. 3. ruled accordingly. Ld. Raym. Rep. 727.

Smithies v. Dr. Harrison.

16. Case of slanderous words by the defendant of plaintiff, who was an attorney, the baron would not allow any thing to be given in evidence on the defendant's part which tended to justify the words, though in mitigation of damages only, and often so practised, but his opinion was, that any thing which tended to shew a provocation, or any transaction between the parties giving occasion for speaking the words was proper in the defendant to make out, because these matters cannot be pleaded, nor would he allow any thing that concerned a stranger to be given in evidence on the trial, nor any [ 160 ] particular credit to be given of the plaintiff, but if the defendant had a mind to examine to this the question must be asked in general. Coram Baron Price at Bodmyn. Trin-Vac. 1716. Dennis v. Pawling.

# (K. b) What may be given in Evidence where the Plea is in Aggravation of Damages.

1. WHERE an information contains some particular offences, as extortion, &c. and afterwards there are general words, which may include offences of the same nature as oppression, &c. if the plaintiff proves the particular offence, he may give evidence of the other offences included in the general words, and this he may do in supplement and aggravation of the particular offences contained in the bill, and the Court will give the greater sentence against him; but if he does not prove the particular offence, then it is otherwise. 2 Brownl. 151. Pasch. 1612. in the Star-chamber, Doctor Manning's Case.

2. In case for words, if they are in their own nature actionable, the jury may consider the damage which the party may sustain; but if a particular averment of special damages makes them actionable, the jury are only to consider such damages as are already sustained, and not such as may happen in suturo; per Cur. 2 Mod. 150. Hill.

28 & 29 Car. 2. in Case of Lord Townsend v. Hughes.

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3. In an action of trefpass, assault, and fasse imprisonment, quousque finem fecit septem librarum. Upon evidence at the trial it appeared that there was but 51. paid by the plaintiff to the defendant for his deliverance, which varied from the declaration, that being 71. But the Ch. J. said, it was well enough; for the action is for the trespass and fasse imprisonment, and the other is only in aggravation of damages. L. P. R. 595, 596. cites Trin. 8 W. 3. in C. B.

4. In trespass for entering the plaintiff's house, and beating his wise, or children, or servants, &c. the latter matters are only alledged as an aggravation of the damage to shew the manner of the entry; for the disturbing the quiet of the family is an injury to the plaintiff, though an action will not lie for it bingly; but the wounding a servant, or loss of his service cannot be given in evidence, but he must bring his action, however the plaintiff may give in evidence, per quod servitiam amiss. 2 Salk. 642. pl. 14. Trin. 5 Ann. B. R. Newman v. Smith.

# (L. b) Evidence. Repugnant to the Isfue.

I. I F one pleads that nothing passed by the deed, he cannot after But quære give in evidence that it is not his deed; for it is contrarying. if it should not be fol. 8.

Ritch. 242. cites 5 H. 7. fol. 2.

Br. General Issue, pl. 38. S. P. by Brian; but Keble contra; but Brook fays, it seems it shall not, and cites 5 H. 7. 8.—Ibid. pl. 79. cites H. 7. 3. S. P. by Brian.

2. In detinue, the defendant faith he doth not detain; he cannot

give in evidence that he hath it in pawn; for it is contrarying.

Kitch. 242. cites 9 H. 7.

3. In a replevin, the taking was supposed to be in a place called [ 161 ] Kelftorn-lyng, and the defendant fays, that the faid place contains 200 acres of pasture, which are, and by prescription have been parcel of the manor of Kelstorn, (and omits naming the county where the manor lay) which manor is and was folum & liberum tenementum of the defendant, and avows the taking of the cattle damagefeafant; the plaintiff in bar to the avowry pleads, that the place where is parcel of the manor of Kelflorn, in Kelflorn aforefaid, and conveys a title to himfelf, and traverfeth its being the avowant's freehold, and iffue was taken on the traverse; and at nisi prius the plaintiff gave in evidence, that there was no manor of Kelftorn, and confequently the 200 acres could not be parcel of it; and by the opinion of the whole Court, this evidence was adjudged repugnant to the plaintiff's own traverse. Dy. 1 3. a. pl. 58. Paich. 2 Eliz. Anon.

> 4. An action of debt was brought upon a leafe for years, the defendant pleaded nil debet per patriam, and did intend to give in evidence an entry of the plaintiff before any rent behind. But per Cur. he cannot do it; for it is contrary to the islue. Ow. 55.

Mich. 29 & 30 Eliz. Anon.

Kitch. 242.

5. In debt upon an obligation made for usury, if the defendant S. P. cites pleads non est factum, he cannot give in evidence, that the bond 7 E. 6. 14. was made for ujury, because it is contrary to the issue. Brown's Anal. 17.

But if the 6. In offife, tenant pleads nul tort nul diffeifin, he cannot give release was in evidence a release of right after the diffeisin; for it is an implied before the diffeifin, it confession of the disseisin, and repugnant to the plea of no tort is good evi- no diffeifin. Jenk. 18. pl. 35. dence.

Ibid. 19.\_C. L. 28;.

7. So in avaste if defendant pleads no waste done, and gives a release in evidence, it is of no use; for the evidence is repugnant to the plea. Jenk. 19. pl. 35.

#### Admitted by what Plea or (M. b) Evidence. Action.

Br. General I. J N debt on account flated, and nil debet pleaded, it was urged hiue, pl. 7. that this confessed the account, and therefore it ought not cites S. C. to be given in evidence, that there never was any fuch account; but per Newton Ch. J. it may be given in evidence, or pleaded. L. E. 199. cites 20 H. 6. 24.

> 2. If the plaintiff pleads fon-affault, he cannot give in evidence that he made no battery; for he acknowledged the battery by his plea. Keilw. 55. b. pl. 4. Mich. 20 H. 7. Gulford v.

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3. In a replication in the avowry, prescribes to have common appurtenant, but doth not shew and aver that the cattle were levant & couchant upon the land, &c. and for that it was held to be naught by the Court. Vid. 15 E. 4. 32. But in this case the iffue was joined upon the prescription; and by the other fault is allowed as confest, and is helped after verdict by the Noy. 145. cites 5 Rep. 43. a. Mich. 3 Jac. Jeffry statute. v. Boys.

4. In a warrantia charta upon warranty, his ancestor the defendant pleaded riens per descent; by the Court, judgment shall be entered for the plaintiff without trial if he will; for the warranty is confest pro loco & tempore; for the trial may be long and [ 162 ]

chargeable. Noy. 149. Thompson v. Jackson.

5. Error of a judgment in the Palace-Court in affumpfit, in which action the plaintiff was to prove arrest as a consideration of the promife, and not producing the writ the defendant demurred on the evidence, but yet the plaintiff had judgment, and now the error affigned was, that he ought to produce the writ; for the King's writs are records, and to be proved only by themfelves, which is very true; but here the defendant had demurred upon the evidence, and by that means had confessed the writ, and the arrest is matter of fact, though it is to be proved by matter of record, and the jury might know that there was a writ; if fo, then by the demurrer to the evidence, all matters of fact are confessed, which the jury might know of their own knowledge. I Lev. 87. Mich. 14 Car. 2. B. R. Fitzharris v. Bojoun. See Dyer, 239. See Error (G) 50. S.C.

6. In an action of trespass for breaking and entring the plaintiff's close, to which not guilty the general issue is pleaded, the defendant cannot give in evidence, that the inclosure was defective, because thereby the trespass is confessed.

Brown's Anal. 14.

7. Affumpfit in confideration the plaintiff would deliver to J. S. ten quarters of malt, to pay for it upon request, if J. S. did not, and fets forth, that he did deliver it, and J. S. did not pay for it, and that he requested the defendant such a day who had not paid it; and at a trial at Middlesex before Twisden and Windham, the defendant would have put the plaintiff to prove the request, but the judges would not suffer it; for the request was traverfable, and not being traverfed is admitted, and the iffue is only on the affumpfit, the defendant having pleaded non afsumpsit. 1 Lev. 166. Pasch. 17 Car. 2. B. R. Anon.

8. In debt on a bond, the defendant pleaded ne unques accouple Comb. 131. in loyal matrimony; this admits a marriage, but denies the legality the case was of it, whereas a marriage de facto is fufficient, and whether in trespass legal or not legal is no ways material. 2 Salk. 437. pl. 1. Trin. for taking

I W. & M. in B. R. Alleyn v. Grey.

his wife, and held

accordingly; but per Holt Ch. J. a plea that they were not married, or not covert in marriage would be good.

VOL. XII.

9. Upon evidence ruled per Ch. J. Holt, that in debt, plene administravit admits the debt, but otherwise in an action on the case, or in an indebitatus assumptit; for there the plaintiss must prove the debt. Mich. I W. & M. Saunderson v. Nichols.

10. Ejeament by mortgagee is not an admitting himself out of possession. Skin. 424. Pasch. 6 W. & M. in B. R. Vid. Eject-

ment, (B) 5. In Andrew Newport's Case.

11. Ejectment on a demise by a corporation aggregate verdict pro quer. in C. B. Error brought, and objected that the demise is not set forth to be by deed, judgment assirmed; for demise is confessed to be good by confessing lease, entry and ouster; and jury could never have found for plaintist if there had not been good demise. 12 Mod. 113. Hill. 8 W. 3. Anon.

12. Action against an administrator upon a note, who pleaded plene administravit; and it was objected, that this note was assigned to J. S. Ruled, that by the plea the right of the action is admitted, and the property of the note in another may not now be objected; otherwise if he had pleaded non assumption. Skin. 650.

pl. 8. Trin. 8 W. 3. B. R. Mitchel v. Mees.

13. In debt on bond brought by an administrator, if the defendant pleads non est factum, the plaintiff in evidence need not shew the letters of administration; for this is admitted by the defendant's plea. L. E. 211. pl. 37.

# (N. b) Of what the Jury may or must take Notice.

1. A Jury may and must take knowledge of any particular record, either patent, statute or judgment, if it be given in evidence to them; for that is their allegata verbally alledged and produced, if it make to the issue; per Hobart Ch. J. Hob. 227. Hill. 12 Jac. in Case of Needler v. the Bishop of Winchester, and denied. Dyer 129. 2 & 3 Ph. & M. Ibgrave v. Heydon.

# (O. b. 1) Evidence. What may be given on the General Issue, upon Not Guilty.

And what may be given in Evidence in the following Cases.

1. A Defendant cannot in any case upon not guilty pleaded give in evidence a licence, but he may give a gift in evidence. Brown's Anal. 15.

2. What matters the defendant may give in evidence on the

general issue pleaded. Vid. G. Hist. C. B. 52. to 54.

3. Where the defendant pleads the general issue, and shews in evidence, that the plaintiff hath no such cause of action as

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is brought, nor no cause of action; this is good evidence upon the general issue. Kitch. 237.

4. Upon the general issue any thing may be given in evidence, which proves that the plaintiff had no cause of action. Try. per Pais,

7 edit. 440.

5. Upon the general issue, it is good evidence for the defendant to convey to himself the same interest and title by evidence. Try. per Pais, 7 edit. 441.

6. As in trespass for gosbawks, and not guilty pleaded, evidence that he had a licence of that wood for years where they were taken,

is good; for it is his title. Ibid.

7. After taking the general issue, the defendant cannot give in evidence any thing that goes in discharge of the action. Try. per Pais,

7 edit. lays it down as a rule.

8. Regularly by the common law, if the defendant has cause of justification or excuse, he cannot plead not guilty; for then in evidence it shall be found against him; for that confesses the special matter and confess and justify the battery. Co. Litt. 282. b.

### [O. b. 2] Affault and Battery.

1. Where the issue in trespass for assault and battery is not guilty, and the defendant gives in evidence fon assault demesse, the evidence is not good. Heath's Max. 84. cites Keilway, 55.

2. In trespass of battery of his servant per quod servitium [ 164 ] amiss, the defendant may plead not guilty, and give in evidence a justification of such battery, which is not any loss of service, as a thrusting away. 2 Roll. (F. f.) pl. 5. cites 14 Jac.

3. In trespass of battery, and not guilty pleaded, the evidence was, that the battery was done in the defendant's own defence,

and ill. Brown's Anal. 17.

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4. If one enter upon land, whereof I am in legal possession, and I desire him to go off my land, and he refuse it, then after this I may use violence, and thrust him off; but I cannot wound him, or knock him on the head. Skin. 228. pl. 7. Hill. 36 &

37 Car. 2. B. R. Kingston v. Booth.

5. Two three or more are doing an unlawful act, as abusing the passers-by in a street or highway, if one of them kills a passerby, it is murder in all; and whatsoever mischief one does, they are all guilty of it; and it is lawful for any person to attack and suppress them, and command the King's peace; and such attempt to suppress is not sufficient provocation to make killing, manssaughter, or son assault demesse a good plea in trespass against them; per Holt 12 Mod. 256. Mich. 10 W. 3. Ashton v.——

6. Trefpass by baron and feme for driving a coach over the wife; per quod the husband was put to great expences in curing his wife; per Powel J. the baron shall not give in evidence what expences he was put to, but the surgeon may be examined to give account of the wound, but no farther, for the baron may bring an action for the other. Hill. 8 Ann. B. R. Dod and Ux' v. Radford.

[O. b.

[ 165 ]

Keb. 620.

pl. 96. S. C.

## [O. b. 3] As to Attachment of Goods.

1. If attachment and condemnation be before a writ purchased, it may be given in evidence on a general iffue, because it is an alteration of the property before the action brought. 1 Salk. 280. pl. 6. Pafch. 5 W. & M. Brook v. Smith.

## [O. b. 3] Attaint.

D. 212. 1. In attaint, the plaintiff fall not give more in evidence, nor proa. pl. 34. duce more witnesses than he gave to the petty jury; but the defendant Iliz. it was may give more in affirmance of the first verdict; agreed plainly for agreed for law. Dyer 53. b. pl. 11. Trin. 34 H. 8. Rolfe v. Hampden. law in Paramour's Case, that if the defendant in attaint gives new matter in evidence to inforce the first verdict, the plaintiff in the attaint shall have answer to it, and disprove it as well as he can; but he cannot give other evidence, nor inforce the evidence first given with other matter than was given before, &c.

## [O. b. 4] Detinue.

1. In detinue defendant pleads non definet, he cannot give in evidence that the goods were pawned to him for money, and that it is not paid, but must plead it; but he may give in evidence a gift from the plaintiff, for that proveth that he detaineth not the plaintiff's goods. Co. Litt. 283. a.

## [O. b. 5] In Ejectment.

1. If an ejectment be brought of twenty acres on a lease of twenty acres, if the defendant plead non ejecit, there if he is found guilty but in ten acres, the plaintiff shall recover, but he should not, if the defendant had pleaded non dimisit. Dal. 105. pl. 50. 15 Eliz. Anon.

2. In an ejectione firmæ brought by the leffee of a copyholder, it is fusficient that the count be general, without any mention of the licence; and if the defendant plead not guilty, then the plaintiff ought to shew the licence in evidence. 2 Brownl. 40. Hill. 8 Jac. C. B. Petty v. Evans.

3 Collateral warranty may be given in evidence, and found by the jury on not guilty pleaded in ejectione firmæ. 10 Rep. 97. b. per Cur. in Seymor's Case, and cites I Rep. Chudleigh's Case.

4. Entry and claim made upon the land within five years after the death of the baron of the Countess of Peterborough to avoid accordingly. a fine, the being iffue in tail, proved by one witness, and allowed at a trial in bar. Sid. 166. pl. 25. B. R. Mich. 15 Car. 2. Floyd v. Pollard.

## [O. b. 6] False Imprisonment by Peace-Officers.

1. In any action upon the cafe, trespals, battery, or of falle imprison-

imprisonment against any justice of the peace, mayor or bailiff of city or town corporate, headborough, portreve, constable, tithingman, collector of fubfidy or fifteenth in any of his Majesty's Courts at Westminster, or elsewhere, concerning any thing by any of them done by reason of any of the offices aforesaid, and all other in their aid or affiftance, or by their commandment, &c. they may plead the general issue and give the special matter for their excuse or justification in evidence. C. L. 283.

2. In an action of false imprisonment, the defendant pleaded not guilty, and gave in evidence the warrant of a justice of peace to arrest the plaintiff, and holden good evidence to maintain the issue, though he is no officer who did execute this warrant. See the stat. of 7 Jac. cap. 5. It feems this is warranted by words in that stat. fc. any others which do any thing by command of justice of peace, and other officers there named. Clayt. 54. pl. 93. Aug. 13 Car.

coram Barkley Judge of Affize. Wenpenny's Cafe.

3. The officer cannot justify the imprisonment of a man for non-payment of taxes under the general printed warrant which the collectors have figned by two justices of peace. But they ought to have a special warrant. Ruled upon evidence at a trial in false imprisonment by Holt Ch. J. at Norwich summer assises, 12 W. 3. Ld. Raym. Rep. 740. Masters v. Butcher.

# [O. b. 7] As to False Return of Writs.

1. In action on the case for a false return of a mandamus (which was directed to the mayor and aldermen of London) brought against the mayor. He may give in evidence, that he voted against the return and was over-ruled by the majority to make this return. And this would be good evidence upon not guilty pleaded, and upon fuch proof the plaintiff would be nonfuited. Carth. 171. Hill. 2 & 3 W. & M. in B. R. Rich v. Pilkington.

2. On information against a mayor for making a false return to a mandamus, commanding him to proceed to the election of a town-clerk for the corporation in the room of one B. to which he returned, that before the arrival of the writ 7. S. had been duly chose and savorn into the said office. And it appeared on evidence, that the right of election was in thirty common council men; that the mayor at fuch a time before the arrival of the writ had fummoned them to meet in order to the election: that twenty- [ 166 ] eight met, that three candidates were fet up, that two of the twenty-eight voted for one, that thirteen voted for another, and the mayor and twelve more voted for the third; that the mayor, pretending to have a casting voice, declared this man duly elected, and at another Court fwore him in. And the following points were in this cafe ruled by Holt Ch. J. 1. That there needs no more evidence to prove this return to be the mayor's, but the copy of the writ and return thereof in the Crown Office. 2. That though upon the confultation the majority be against him, and make

make a return in his name, yet it shall be taken to be his if he does not come and difavow it. 3. That it is not necessary to prove a delivery of the writ to the mayor, no more than to a sheriff in a falle return against him. 4. That notwithstanding the writ is to be delivered to the mayor as the most visible part of the corporation. 5. That this action for a false return may be brought against the whole corporation, or against any particular member of it. 6. That the mayor or other head officer of common right has no casting voice; but such a thing may be by particular conflitution, as by prescription or charter. 7. If there be an equality of votes, and therefore they cannot choose, upon mandamus they must agree, or else they shall be all brought up as in contempt, and laid by the heels till they do agree, for after a jury is fworn they shall be impounded till they all agree, but here it suffices that a majority do agree. And here the mayor was found guilty. 6 Mod. 152. Pasch. 3 Ann. B. R. The King v. Mayor of Bath.

## [O. b. 8] As to Highways.

Carth. 272.

1. Per Holt Ch. J. upon a presentment for not repairing a highway, on not guilty, you cannot give any thing in evidence, but only that the way is repaired. If they plead they ought not to referentment that a highway was out of repair, they must set forth who ought. You cannot give in evidence no highway, but may traverse it. Eyres contra Dolbin, they may give in evidence that it is no highway, but not that they ought not to repair it. 12 Mod. 13. Mich. 3 W. & M. The King we the Inhabitants of Hornsea.

not guilty; per the other justices contra Holt, it may be given in evidence that it was no highway. Show. 270. 291. S. C. and S. P. by Holt Ch. J. but Eyre J. contra, & adjornatur.

2. Upon an indictment against a parish for not repairing a high-way, they can give nothing in evidence upon a not guilty, but that the way is in repair; but if it be against a particular person, he may give evidence that others ought to repair it. Comb. 396. Mich. 8 Will. 3. B. R. The King v. Ireton and Inhabitants in Cumberland.

## [O. b. 9] Maintenance.

1. If upon the general issue the defendant gave in evidence, that at the request of the party he gave him counsel to sue out a supersedeas, and good, because no maintenance; but in that case ought of necessity to plead the general issue. Heath's Max. 81. cites 22 H. 6. 35.

2. But if he in evidence shew a special maintenance, as sworn in a jure patronatus, and the like, that will not stand with the general issue. Heath's Max. 81. cites 28 H. 6. 6.

## [O. b. 10] Parco Fracto.

1. Action upon the statute of (parco fracto) not guilty, and evidence that he has no park is good. Kitch. 237. cites 19 H. 6. tol. 7.

[O. b. 11] Rescous.

1. Upon not guilty in rescous, the defendant shall not give non

tenure in evidence. Heath's Max. 76. cites 9 H. 7.3.

2. Upon not guilty, it is no evidence to fay that the inciofure quas defective, because thereby the trespass is confessed. Heath's Max. 76. cites 19 H. 8.6.

## [O. b. 12] Trespass.

1. Trespass, not guilty, and evidence, that the property was to Br. General J. S. who gave them to him, is good. Kitch. 239. cites 9 H. 6. Issue, pl. 5. cites 5 H. 6. 11. S. P.

2. Trespass, not guilty, and evidence that the place where the trespals was done is the freehold of another, and not of the plaintiff, is good. Kitch. 237. cites 4 E. 4. fo. 5.

3. Trespass, the defendant pleads not guilty, and gives in evidence, that it is the freehold of another, and good; for then the plaintiff hath no cause of action. Kitch. 238. cites 4 E. 4.5.

5. Trespass, not guilty, and in evidence a lease for years is

good. Kitch. 239. cites 12 H. 8. f. 2.

6. If my cattle escape into the foil of another through the fault of the fences, which he ought to repair, I cannot plead not guilty and give this in evidence, because such evidence acknowledges the

trespass, and justifies it. Co. Litt. 283. 19 H. 8. 6.

. If my beafts break into another man's close in default of his inclosure, I ought to alledge the special matter by way of plea; but it was moved that it might be given in evidence, though not to nonfuit the plaintiff, yet it might to mitigate the damages; but per Shelley, that cannot be; for peradventure the jury might thereby incur the danger of an attaint. Kilw. 203. b. pl. 2. 21 H. 8. Anon.

8. Trespais, not guilty, the defendant may give a leafe for years in evidence; contrary of a leafe at will, for this is determinable at

pleasure. Kitch. 239. cites 25 H. 8. General Islue, 82.

9. Trespals, the defendant pleads his freehold, and gives in evidence a fine with proclamation; it is good, for it is a title. Kitch. 239. cites 27 H. 8. 27.

10. Per Cur. upon not guilty, it is good evidence for the defendant to flew that the land belongs to another, and put the plain-

tiff to shew title. Keil. 61. pl. 6. Hill. 20 H. 7.

11. In an action of trespals, where the defendant pleads not Br. General guilty, and makes the title by a firanger, it is no evidence to fay that lifue, pl. 81. be committed the trespals by the commandment of the stranger, but 8.-Kitch.

240.cites S. ought to plead the same, as he must do the licence of the plaintiss C.-S. C. himself. Brown's Anal. 15.

Vaughan Ch. J. Freem. Rep. 44. pl. 52. in Case of Fox v. Grundie.

12. In trefpass not guilty was pleaded, the evidence was, that locus in quo fuit liberum tenementum of T. S. who licenced the defendant to enter, by virtue whereof he entered accordingly, but no good evidence, because it is a justification. Brown's Anal. 17.

13. In trespass de bonis captis, the defendant pleads non cul. and gives in evidence, that he recovered the same goods by verdict, and had them delivered to him in execution, and good. Brown's Anal. 17.

14. In trespass, and not guilty pleaded, the evidence was, that the property was to J. S. who gave them to the defendant, and

good. Brown's Anal. 17.

15. But in trespass, where not guilty was pleaded, the evidence was, that the property was to J. S. and that the defendant as his fervant, and by his commandment, took the goods in the count, and ill; for he thereby confesseth the trespass, and yet justifies the same. Brown's Anal. 17.

Kitch. 239. 16. Trespals for taking of goshawks, not guilty pleaded, and cites 16 E. evidence given, that the defendant has a lease of the woods where the Br General hawks were taken, and good, because he thereby makes a title

Issues, pl. to himself. Brown's Anal. 17.

E. 4. 1. but adds a quære, if the trees were reserved, as in 14 H. 8.

17. Trespass of goods carried away the defendant pleads, that the property of the goods was not in the plaintiff, and that is no plea in trespass, but in replegiare. And some for that seem, that this is no good evidence in trespass, upon a plea of not guilty. Kitch. 238. cites 27 H. 8. so. 25.

18. Trespass of goods taken, the defendant may plead not guilty, and evidence that he recovered, and had them delivered in execution, and is good. Kitch. 239. cites 12 Book of Ass. 73.

19. In an action of trespass the defendant pleaded not guilty, and if he might give in evidence, that at the time of the trespass the freehold was to such an one, and he as his fervant, and by his commandment entered, was the question; and it was faid by Coke, that the same might be so well enough, and so it was adjudged in Trivilian's Case; for if he by whose commandment he enters has right, at the same instant that the defendant enters the right is in the other, by reason whereof he is not guilty as to the defendant, and judgment was given accordingly. I Leon. 301. pl. 414. Trin. 31 Eliz. in Diersly v. Nevel.

20. In trespass for breaking his close, upon not guilty pleaded he cannot give in evidence that the beasts came through the plaintiff's hedge, which he ought to keep; nor upon the general issue justify, by reason of a rent-charge, common, or the like. Co.

Litt. 283.
21. In trespass, tender of 2s. 6d. in amends was pleaded, and averred

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averred that the faid fum was fufficient; this was upon the new statute 21 Jac. and iffue taken upon the sufficiency of the amends. In this case the defendant began the evidence to prove the amends fufficient, and was directed to shew the trespass, what it was, and prove the tender, &c. and the plaintiff in this case was not permitted to shew or prove more trespasses than one of which he had declared. And that which the plaintiff fets forth shall be the trespass, and not that which the defendant sets forth if they vary; then the plaintiff did prove it to the value of 5s. and the defendant would have left it to the jury, whether the trespass of two beafts in April in grafs-ground could be of that value, but the judge would not permit it so for the jury to judge, as if no proof was when the witness had expressly proved it to the value of 5 s. when the defendant had failed to make proof what the trespais was, so to apply his amends tendered to that trespass, in which he had failed before. Clayt. 70. pl. 122. Affif. a. Aug. 1639. before Vernon and Hendon Judges.

22. Where not guilty is pleaded in trespass, a release cannot [ 169 ] be given in evidence; for fuch evidence and the defendant's plea is contrary. A release implies a confession of the trespass, and

a discharge of it by the release. Jenk. 280. pl. 4.

23. For making a trespass continuando there ought to be a reentry of the plaintiff, and for the not proving thereof the plaintiff shall have damages only for the first entry. L. of E. 7th edition,

440. cites Mich. 22 Car. 1.

24. Trespass was brought quare domum & clausum fregit, & Ibid. The bona asportavit, &c where the defendant in truth did the trespass reporter by virtue of a commission of bankrupts. The Court held that the rationem. plaintiff having declared of the entry into his house the defendant cannot plead not guilty and give the special matter in evidence, but ought to have pleaded the statute of bankrupts, and all the special matter; but if the trespass had been laid for taking of the goods only, he might have pleaded not guilty generally. Litt. Rep. 356. 6 Car. C. B. Anon.

25. In trespass quare clausum fregit, it is a plea in abatement to fay that the plaintiff is tenant in common with another, but cannot be given in evidence upon not guilty, as it may where one tenant in common brings trespass against the other. Vent. 214.

Trin. 24 Car. 2. B. R. Anon.

26. Where corn, &c. is taken away at several days the right way is to fay tali die & diversis diebus, & vicibus inter talem diem & talem diem; for if it be laid on a certain day with a continuando plaintiff can give in evidence but one day, though they may choose their day, for that which is done on one day cannot be continued. Comb. 427. Trin. 9 W. 3. C. B. Anon.

27. In trespass for breaking the plaintiff's close, and treading his grafs, &c. the defendant upon not guilty pleaded, cannot give any matter of right in evidence, not even in mitigation of damages; per Holt Ch. J. 6 Mod. 153. Pafch. 3 Ann. B, R. Dove v. Smith.

adds quære

### [O. b. 14] Trover.

1. Action upon the case of finding his goods, and converting them to the use of the desendant, not guilty, and evidence that they were not goods of the plaintiff is good. 3 Mar. and 33 H. 8. Action upon the Case 209. Otherwise it is in trespass. Kitch. 237. cites 27 H. 8. fol. 25.

2. Action upon the case of finding goods, and converting them to his own use; the desendant pleads not guilty, and evidence that they were pawned to him for 101. is good. Kitch. 239. cites 4 E. 6.

Br. 113.

3. Trover and conversion brought by the citizens of Colchefter, against the farmery of the toll of the citizens of London, for taking their goods; upon not guilty pleaded, there was a trial at bar by a Hartfordshire jury, where the defendants confeffed the taking the goods; but that it was for non-payment of toll, which the defendants claimed by custom; the citizens of Colchester claimed to be free by the charter of King Richard, and the citizens of London proved by divers records and entries in their books, that the citizens of Colchester had paid toll; it was objected against the defendants evidence, that it was not good upon the general issue, but that they ought to have pleaded the matter specially; and the Court held accordingly; for it is not like to a general action of trefpass, for there they ought to have pleaded the custom specially; but in trover any thing may be given in evidence on the general iffue, which may prove the conversion to be lawful; the jury gave a general verdict for the defendant and 167 ] judgment accordingly. Jo. 240. pl. 5. Pasch. 7 Car. B. R. Colchester City v. London City.

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4. In trover and conversion, upon not guilty, the evidence was, that the goods were taken and fold by virtue of a commission of fewers; and it was ruled, that this matter might be well given in evidence upon not guilty pleaded, as detaining of beasts in a market for toll. Allen. 92. Mich. 24 Car. B. R. Combs v.

Cheney.

7 Mod. 141. S. C. held accordingly.

5. The plaintiff brought trover as administrator, and declared upon the possession of the intestate; and upon not guilty pleaded at the trial, the counsel for the desendant offered to give in evidence, that the pretended intestate made a will and an executor; but Holt Ch. J. over-ruled it, and took this diversity, That where an administrator brings trover upon his own possession, the desendant may give in evidence a will and an executor upon not guilty; otherwise if it be on the possession of the intestate, (as in the principal case) for there the desendant ought to plead it in abatement, and if he does not, he shall not give it in evidence. I Salk. 285. pl. 17. Mich. I Ann. Blainfield v. Marsh.

6. In trover for million lottery tickets, upon evidence it appeared, that the plaintiff had given to a goldsmith the ticket in question to receive the money due on them, that some payments were due

and fome were not, and gave a note to pay the plaintiff fo many million lottery tickets; that the plaintiff's tickets were delivered to the defendant by the goldsmith upon this note, which was produced and read as evidence against the plaintiff; and per Holt Ch. J. the way and manner of trading is to be taken notice of, and the best proof that the nature of the thing will afford is only required; when goldfmiths give their notes no perfons are by to be witnesses, and their notes to pay money or tickets are evidence of the receipt of their money. If the Exchequer, or any private person had paid to the goldsmith the money for the tickets, it had been a good payment against the owner, but whether it would be fo where tickets not due are bought for a valuable confideration he doubted, but as the goldsmith here had tickets here of the plaintiff and defendant, the delivery of the plaintiff's tickets to the defendant was no change of the property or any confideration; for though the owner gave the goldsmith power to receive money for the tickets, he did not give him power to change them for other tickets, and the plaintiff had a verdict. If the money is stolen and paid to another, the owner of the money can have no remedy against him that received it; but if bank-notes, exchequer-notes, or milliontickets, or the like, are stolen or lost, the owner has such an interest and property in them, as to bring an action into whatfoever hands they came; money or cash is not to be distinguished, but the notes or bills are diffinguishable, and cannot be reckoned as cash, and they have distinct marks and numbers on them. 1 Salk. 283, 284. Hill. 12 Ann. Guildhall. Ford v. Hopkins.

[O. b. 15] Warren.

1. Trespass in warren, not guilty and evidence that he has no warren is good. Kitch. 237. cites 10 H. 6. fol. 17. and 34 H. 6. fol. 7.

[O. b. 16] Wafte.

1. In waste, upon the plea of no waste done, defendant may give in evidence any thing that proves it not waste, as by tempest, lightning, enemies, &c. but he cannot give in evidence justifiable waste, as to repair the house, &c. Co. Litt. 83. a.

2. If lessee does waste, and before action brought he repairs it, [ 171 ] and afterwards lessor brings action of waste, and lessee pleads quod non fecit vastum, he cannot give the special matter in evidence. Co. Litt. 283. a.

## [O. b. 17] Writ of Right.

1. Debt, and per Lakin in writ of right the mife is joined, and the tenant gave in evidence a release made in another county, the grand of the find it; for it is said elsewhere, that nothing may be pleaded

pleaded in this action but collateral warranty, but all others shall be given in evidence. Br. Droit de Recto, pl. 48. cites 9 E. 4, 40.

# (P. b. 1) Evidence. For or against what Persons having Relation to others.

### Accessory.

I. INdictment of A. as accessory to B. and C. evidence proves him accessory only to B. this maintains the indictment. L. E. 286. pl. 37.

2. Two indicted as principals; evidence proves one accessory before, he shall be discharged of that indictment. L. E. 286. pl. 40. cites H. P. C. 266.

### [P. b. 2] Bail.

1. In action against the bail, who pleads render of principal in discharge, there must be a copy of the judgment and of the commitment given in evidence. Per Holt Ch. J. 12 Mod. 559. Mich. 13 W. 3. Anon.

## [P. b. 3] Bailiff and Receiver.

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1. In a trial at nifi prius at Guildhall, it was ruled by Holt Ch. J. that where the mayor and commonalty of London had constituted J. S. their bailiff to receive their rents, and to make demand of them, and to make entry; upon evidence in ejectment, such general authority is not sufficient to authorize a bailiff to take advantage, and make demand of a rent accrued due after the authority given; for it is a new right attached, and ought to be a special authority for this purpose. Skin. 413. pl. 10. Hill. 5 W. & M. in B. R. Dixon v. Smalley.

# [P. b. 4] Baron and Feme.

1. Upon evidence in an action upon the case for meat, drink, washing and lodging found for the wife of the defendant by the plaintiff; the proof was that the wife came in a necessitous case, and said to the plaintiff that she was the wife of the desendant, and that he had turned her out of his house, and allowed her 501. per annum, but that he would not pay it; upon which Holt Ch. J. was of opinion that the husband is not chargeable, for it being apparent that she did not cohabit with her husband, she shall not have credit to charge him without his consent, and though it was proved that he had paid another who had received and tabled her before the plaintiff had received her; yet the plaintiff was non-

nonfuit; for Holt Ch. J. faid if a wife cohabit with her husband, and by it gains a credit, though the depart without the leave of her husband, and come to London, and becomes in debt, the husband shall be charged till notice given of her elopement, for it shall be intended to be with the consent of her husband; but after notice the husband shall not be charged without his consent. Skin. 323. pl. 2. Mich. 4 W. & M. in B. R. Peirce v. Welden.

2. At nisi prius at Westminster, an action was brought for money received to the use of the plaintiff; upon the evidence it appeared to be money fecretly deposited by the wife, and a note taken for it in the name of a third person, and after the death of the wife the action was brought by the husband; and in this case it was proved that the wife faid that she had received the money deposited again; and an exception was taken that this is not evidence, fed non allocatur, for the matter being transacted by the wife, and the case depending only upon this transaction, that which the wife faid is evidence. Skin. 647. pl. 4. Trin. 8 W. 3. B. R. Webb v. Plumsted.

3. Though it was pretended that there was a recovery in husband's time, and that they would prove by the sheriff who had a writ of execution; yet they having not the judgment on which the execution was, it was ruled they could not give that in evidence. Per Holt. 12 Mod. 346. Mich. 11 W. 3.

4. Though feme covert feal, and deliver a deed, yet she may plead non est factum, and give coverture in evidence. Per Holt Ch. J. 12 Mod. 609. Hill. 13 W. 3. Anon.

# [P. b. 5] Carriers.

1. A box of jewels was delivered to a ferryman, who knowing not what was in the box, threw them over-board into the fea, and refolved he should answer for it. Cited by Roll. All. 93. Mich. 24 Car. B. R. as was ruled in one Barcroft's Cafe.

2. Trover lies not against a carrier for negligence, as for losing a box, but it does for an actual wrong; as if he breaks it to take out goods or fell it. Per Cur. 7 W. 3. B. R. That a denial was no evidence of conversion, where the thing appeared to be lost by negligence, but if that does not appear, or if the carrier had it in his custody, when he denied to deliver it, it is good evidence of a conversion. Coram Trevor Ch. J. at Nisi Prius at Guildhall. 2 Mod. 655. pl. 4. Anon.

4. A box was fent from Somersetshire by Taunton carrier to N. B. This London, directed to Mr. Were at the Temple; he goes to the inn to been tried at enquire for the box, and leaves word that it should be brought to him Wells, coby a porter, this was on the 26th of Dec. When the carrier ram Justice comes in, the porter belonging to the carrier takes this box and other verdict for goods, and carries them in a cart to the Temple-gate, where he takes the plaintiff. out the box and enquires for Mr. Were's chambers, but a person un- But he had known conducts him to the wrong chambers, where he leaves the box, a new trial

and

and it was never more heard of. In action against the carrier, his witnesses said the box was directed to Mr. Were's, No. 1. in the Temple; but this was denied by Mr. Were, his chambers were in the Paper-Buildings, but the box was delivered in Tanfield Court next the arch and paid for. Two counts in declaration on general cultom about carriers, the other on an undertaking to carry from Taunton to London, and there to deliver the box to Mr. Were. There was money, a great coat, a pye, a precedent-book, &c. in the box. Having proved goods put into the box and value, it was objected that the delivery to the porter was a discharge to the carrier, it being by Mr. Were's order. But Baron Cummins in direction to the jury, faid that the question [ 173 ] was, whether the box was delivered according to the fecond count; and if box was delivered to carrier as directed, and not altered, and if pursuant to Mr. Were's order, otherwise he feemed to think that the carrier was not discharged of his undertaking, and if the goods were carried out of the inn by the porter without the order of the party, that the carrier was liable. But the jury discovering their intention to find for defendant the plaintiff was nonfuited. Coram Baron Cummins at Taunton Aff. Hill. Vac. 1727-8.

# [P. b. 6] Custom-House Officers.

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1. In the Court of Exchequer Ld. Ch. Baron Bury, Montague and Page against Price held, that where an officer had made o feifure, and there was an information upon it, Sc. which went in favour of the party, who afterwards brings trespass, the shewing thefe proceedings was sufficient to excuse the officer; it was competent to make out a probable cause for his doing the act. Mich. 6 George.

# [P. b. 7] Executors and Administrators.

But where 1. Debt against executors, upon plene administravit pleaded, the action they gave in evidence, that they had redeemed part of the testator's was on a goods with their own money, which he had parwned for the full value, debt upon the tellater's and that they had paid the full value of the refidue to discharge his bond, there debts, and this was held good evidence. Dyer 2. pl. 3. in Cam. payment of Scace. Mich. 6 H. 8. his debts,

tracts made by the testator, had not been good evidence to maintain such plea, because they were not compellable. Dy. 31. a. pl. 2. Pafch. 28 & 29 H. 8. Anon.

> 2. In debt against executors, the iffue was upon affets in their hands on day of the action brought, and the evidence was, that a fum of money to the value of the debt was brought in on that very day into the Prerogative Court of Cant. and there delivered to the executors as a debt due to the testator, which they paid the same day to a creditor of the testator, by the order of, and in the said Court; sed non allocatur as an administrator, but shall be held affets to the plaintiff, though

though the writ was purchased the same day after payment of the money. But it should have been pleaded specially, and then perhaps the defendant might have aided himself thereby; whereupon the jury found affets generally, die impetrationis brevis, without giving any special verdict. D. 208. a. pl. 16. Mich. 3 & 4 Eliz. Anon.

3. The plaintiff fued as administrator for goods, and non detinet was pleaded, and the defendant produced in evidence letters testamentary of the same man, who was supposed to die intestate, and it was admitted as good evidence. Clayt. 66. pl. 115. Affife

July 1638. before Barkley Judge. Preston v. Hall.

4. A man may give in evidence any thing upon the scire fieri inquiry upon a non devastavit, that he might bave given in evidence upon plene administravit. Per Gould J. Ld. Raym. Rep. 591. Trin.

W. 3. in Case of Rock v. Layton.

5. If an executor bring trover upon the possession of his testator, upon not guilty he should not be put to prove himself executor; fecus, if he had brought it on his own poffession. 7 Mod. 141. 1 Ann. B. R. per Holt Ch. J. at Guildhall, in the Cafe of Blainfield v. March.

6. Trover by an administrator, the plaintiff declared of a possession in the intestate, and of a loss by him in his life-time, and then he lays the conversion to be in his own time, &c. Per Holt Ch. J. the [ 174 ] defendant should have pleaded it in abatement, and it cannot be given in evidence upon not guilty pleaded, because here the property is laid in the intestate. But if the plaintiff had declared upon a property in himself, and it had appeared upon the evidence that he claimed the goods but as administrator to J. S. &c. there the evidence of an executor had been a bar to the plaintiff, because it would have defeated his property, upon which his action is founded. And a verdict was given for the plaintiff, and intire damages. 2 Ld. Raym. Rep. 824. Marsfield 1. Marsh.

#### [P. b. 8] Inn-keepers.

- 1. At Guildhall upon evidence the case was, a man had a horse in an inn, and came thither, and directed that the inn-keeper should not give him any more food, for he would be responsible for it; and the question was, if for the food after this direction given by the innkeeper to the horse, he who brought the horse thither shall be charged or not; and Holt Ch. J. at first inclined that this is 2 discharge, and that the horse (though he might be retained by the inn-keeper yet) is but in the nature of a diffrefs; and it being in the custody of the inn-keeper in his inn, this is a pound-covert, and the horse ought to be afterwards found and maintained at the peril of the inn-keeper; but after mutata opinione, he directed that this was not a discharge, for then any inn-keeper might be deceived, and it is the leffening of an inn-keeper's fecurity, who may detain, and by the custom of London sell the horse for his keeping. Skin. 648. pl. 6. Trin. 8 W. 3. Gilbert and Berkley.

2. If a man brings a horse to an inn, and desire the master to put him into a stable till it cools, and then send him to grass, if the horse be stole before he sends him to grass he shall answer for him; though if he had sent him to grass pursuant to the owner's desire he would not be answerable; and so he shall be chargeable till he has performed the trust reposed in him, and as soon as he has performed it he shall be discharged. Per Holt Ch. J. 12 Mod. 484. Pasch. 13 W. 3. in Case of Lane v. Sir Robert Cotton.

# [P. b 9] Landlord and Tenant.

1. At Guildhall, in ejectment for a meffuage in London, it was objected against the title of the plaintiff that this was a messuage above 401. per annum rent, and that the austom of the city is, that there ought to be warning given for the space of half a year where the meffuage is of fuch a rent, and by the space of a quarter of a year where 'tis under fuch a rent, and an antient book in French was produced, in which fuch custom was registered, the which was allowed to prove the custom; but the question was, if this custom gave the party an interest, or only entitled him to an action, if it be oufted within the time, as in the common cases of leafes for years, or at will, with agreement for a quarter's warning; if the party depart without warning, an action of debt does not lie for the rent, but an action on the case sounded upon the agreement, and though Holt Ch. J. faid, that he had heard that North C. J. had ruled upon evidence that the custom gave an interest; and it was objected, that if it did not give an interest it was not of any benefit to the citizen, who ought to have a reasonable time to remove his effects; yet the Ch. J. inclined e contra, and it was referred for his confideration. Skin. 649. pl. 7. Trin. 8 W. 3. B. R. Tyley v. Seed.

[ 175 ] 2. If the plaintiff were lessee the lesser might lawfully enter to fee waste; and there to make him a trespassor the lessee ought to show some mishehaviour in him, as cutting a tree, destroying the corn, or staying on the land all night, &c. Per Holt Ch. J. 12 Mod. 582. Mich. 13 W. 3. in Case of Chancey v. Win & al.

# [P. b. 10] Master and Servant.

1. In an action upon the case for money received by the defendant for the use of the plaintist, the evidence was that the defendant was apprentice to the plaintist, and this was for service done in a ship of the King's, during the apprenticeship; and the indentures of apprenticeship being produced to prove the defendant apprentice to the plaintist; it was insisted that the hand of the defendant ought to be proved; to which Holt Ch. J. agreed, unless the indenture be enrolled. Skin. 579. pl. 2. Pasch. 7 W. 3. B. R. Anon.

2. If my fervant has a note for money due to me or other goods, which in their nature are not properly in the custody of a servant, that is evidence prima facie that he has an authority from me to ap-

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ply them to fuch use as he does after put them to; but the contrary may be given in evidence, as that he came by the note by undue means, or had it to another particular purpose; per Holt Ch. J. 12 Mod. 504. Mich. 13 W. 3. Anon.

3. The fervants of a carman run over a boy in the fireet and The fermaimed him, by negligence; and an action was brought against the with his cart master, and the plaintiff recovered. Ld. Raym. Rep. 739. run against Anon.

there was a pipe of wine, viz. fack, and overturned it, whereby the fack was fpoiled, and run into the ftreet; and an action was brought against the master, and held good by Holt Ch. J. at Guildhall .-Ex relatione Majestri Place. Ld. Raym. Rep. 739. Anon.

#### [P. b. 11] Merchant and Infurer.

1. A. insured the freight of a ship from all losses and da- Comb. 56. mages, which should befall the ship or merchandizes in her, ex- judgment. cepting only perils of the fea. The ship was taken by pirates; Barton v. and to prove that pirates are perils of the fea, a certificate of mer- Wolliford. chants was read in Court that they were so esteemed. But the Court defired to have the master of the Trinity-house, and other sufficient merchants to be brought into Court to fatisfy the Court viva voce on the Friday following. Sty. 132. Mich. 24 Car. Pickering v. Barkley.

2. In an action brought upon a policy of insurance of a ship, if it appears upon the evidence, that the ship was condemned by procefs of law and feifed; by this sentence the property and ownership are destroyed, and there is no remedy upon the policy of infurance; ruled by Holt Ch. J. May 31, at Guildhall. Paich. 10 W. 3. 1698. Ld. Raym. Rep. 724. Anon.

3. It was ruled by Holt Ch. J. May 31, Pasch. 10 W. 3. at Guildhall, that in an action upon a policy of affurance of a ship, if the plaintiff's witness swears, that the ship was condemned by process of law, it is good evidence to prove it; but if the defendant had offered that matter in evidence by his witnesses, it would not have been sufficient without producing the sentence of condemnation. Ld. Raym. Rep. 732. Anon.

# [P. b. 12] Partners.

[ 176 ]

1. In an action on the case for money had and received to the plaintiff's use, it appeared upon evidence, that Layfield and the other defendants were bankers and partners, and that the plaintiff had given Layfield 20 l. for which he received a ticket in the Double-Exchange Lottery, and Layfield undertook to pay what benefit should happen thereupon; that the ticket came up a 40 l. benefit, and for that money the action was brought against Layfield and partners; and it was objected for the defendants, That it did not appear that any of them had undertaken to be trustees in the lottery but Layfield, and therefore he only ought to be charged, and not his partners; to which Holt Ch. J. answered, That they were partners in VOL. XII.

their trade, and goldfmiths, and that the adventurers put their money in upon the credit of the several goldsmiths that had undertaken to pay the benefits; and it should be prefumed, that the act of Layfield was the act of the others, and should bind them, unless they could shew a disclaimer or refusal to be concerned in it. I Salk. 292. pl. 33. coram Holt Ch. J. at Nifi Prius. Layfield's Cafe.

# [P. b. 13] Sheriff.

1. An action upon the case against a sheriff upon an escape suffered by his bailiff upon a mean process, and it was proved in evidence as necessary to make this case that there was such a debt, that fuch a process and warrant was, and is a due debt. And lastly, that the party arrested was become insolvent, otherwise he should not have recovered damages to the value of his debt, as here he did upon all this proved evidence as aforefaid. Clayt. 34. pl. 59. Ashf. a.

Aug. 11 Car. Barkley Judge. Tempest v. Linley.

2. In trespass brought against the sheriff for goods taken, upon not guilty pleaded, he gave in evidence, that he levied them in execution by virtue of a fieri facias. The plaintiff made title to the goods by a prior execution, but fraudulent, and by bill of fale made of them to him by the officer, viz. the sheriff predecesfor to the defendant. And upon this trial before Holt Ch. J. at Hertford, Lent affifes 1698. 11 Will. 3. it was ruled by him after argument of the counsel on both fides, that the defendant, though sheriff, ought to give in evidence a copy of the judgment. But it would have been otherwise if the trespass had been brought by the person against auhom the fieri facias iffued. Ld. Raym. Rep. 733. Lake v. Billers and al.

[P. b. 14] Strangers.

6 Mod. 44. alience by ing under aleast.

1. If one makes an answer in Chancery, which may be prejuread against dicial to his estate, it may be given in evidence against him, but not against alienee. 1 Salk. 286. pl. 19. Hill. 2 Ann. B. R. any claim- Ford v. Grey.

# [P. b. 15] Successors.

1. The lease of a bishop not warranted by the statute is avoidable by the fuccessor only and not by himself, per Curiam. Keb. 182. pl. 153. Mich. 13 Car. B. R. in Cafe of Scudamore v. Bellisfon.

2. Plaintiff was nonfuited in ejectment against the former master of Et. Catherines in a former trial, and this was given in evidence now against the new master, though the council objected, that the mafter comes not in privity, and that there was more given 177 ] in evidence here than at the former trial; but per Pemberton Ch. J. the fuccessor comes in under his predecessor, and is like to an beir and ancestor. Skin. 15. Mich. 33 Car. 2. B. R. Ld. Brounker and Sir Robert Atkins.

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### [P. b. 16] Traders.

1. The way and manner of trading is to be taken notice of, and the best proof, that the nature of the thing will afford, is only required. When goldfmiths give their notes, no witnesses are by, and their notes to pay money or tickets are evidence of the receipt of the money; per Holt Ch. J. 1 Salk. 283. pl. 14. Hill. 12 W. 3. Ford v. Hopkins.

# (Q. b. 1) What must be given in Evidence in Respect of the Plea.

#### Account.

1. ACCOUNT of receipt by the hands of J. S. the defendant pleads he was never the receiver; and evidence that J. S. gave that to him is good. Kitch. 232. cites 2 H. 4. fo. 13.

2. Debt upon arrearages of account, he oweth him nothing in Br. General manner and form, and evidence that there was no fuch account is good. 2 H. 6 fo. 26. Kitch. 237.

& S. P. by

3. In debt upon an account, the defendant may plead nul tiel accompt or nil debet, and give in evidence that there is no account between the parties. Heath's Max. 9. cites 20 H. 6. 24.

Br. General Iffue. pl. -. cites S. C. & S. P. by Newton.

4. Upon an infimul computaffet, the plaintiff must be sure to prove the day of the account and fum certain; agreed upon; otherwise he will be nonsuited. L. P. R. 25.

5. In an infimul computaffet, if the plaintiff proves a penny lefs, or more than is laid in the declaration he must be nonsuit. Trin. 2 Ann. Hill v. Rebow.

# [Q. b. 2] Non Cepit.

1. Replevin of a fow and pigs, the defendant justifyed for the fow, and to the pigs ne prist pas, and it was found by the jury that the fow was with pig at the time of the taking, and farrowed her pigs, and well; and fo it feems that this matter was given in evidence, and therefore this is a special taking in law. Br. General Issue, pl. 88. cites 18 E. 3. and Fitzh. Replevin, 34.

2. Action of extortion against the sheriff, who pleads that he took not, and evidence that by prescription he hath a bar fee of every one which he takes, and is good; for it is no extortion. Kitch. 238.

cites 21 H. 7. fo. 17.

3. On non cepit, the evidence was, that there being a conten- Godb. 112. tion about some sheep which were then in an highway, or had been pl. 135. Woody. Ash feifed as felons goods, &c. one P. came to F. and giving bond to re- and Foster.

S. C. held flore the sheep to him who had right to them, he took the sheep into accordingly; his keeping, &c. and farther that the servants of F. had seised the doth stay, said sheep to his use, yet F. non cepit; per Cur. 1 Le. 42. pl. 54. does not Mich. 28 & 29 Eliz. C. B. Wood v. Foster.

139. S. C. but S. P. does not appear.

in evidence; per Hale. Vent. 249. Mich. 25 Car. 2. B. R. in Case of Wildman v. Norton.

#### [Q. b. 3] Contract.

1. If the plaintiff in his declaration mistake the contract, either in the sum or in the thing fold, nil debet will be a good plea. Heath's Max. 80. cites 21 E. 4. 20.

2. The defendant may give in evidence that the contract was conditional, or may plead the same as appears there without traverse; the like, as it seems upon non assumption in action upon the case. Heath's Max. 79. cites 28 H. 8. Dy. 29.

# [Q. b. 4] Non Infregit Conventionem.

1. B. covenants that he was feifed of Black-acre in fee simple, where in truth it was cepyhold land in fee according to the custom; per Cur. the covenant is not broken; and the jury shall give damages in their consciences according to that rate that the country values fee simple land more than copyhold land. Nov. 142. Gray v. Briscoe.

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2. In covenant the issue was, whether the defendant had made an estate sufficient in Black-acre to the plaintiff or not; and the evidence was, that the estate was not of such a value, and ill, for it is not answerable to the matter in issue. Brown's Anal. 17.

# [Q. b. 5] Non Dimisit.

1. If a demise to the baron and seme be pleaded, a sine sur release to them is no evidence to prove the same. Heath's Max. 80. cites 50 E. 3. 6.

Andbecause the words of the fecond lease made to have from the feast of St. Michael next ensuing for 21 years, and after the same lessor by indenture reciting the said lease, and that it bore date the 6th of August 23 H. 8. &c. leases it for years to commence from the expiration of the first lease, and it is pleaded, that R. his W. Let. till the end of 30 years then next immediately after he demise the mon dimissit modo of forma. The last indenture may be that he non dimissit modo of forma. The last indenture be mistaken, for it is not material, but the effect of the issue is upon the faid hist be demise. D. 116. pl. 70. 2 & 3 Mary adjudged.

fully ended and expired, and were not to have and to hold, &c. for the faid years, &c. after the faid first demise and indenture fully ended, &c. the faid lease made to L. and his W. was good notwith-francing

standing the false recital of the 6th day of August mentioned in the said indenture, and that this recital was as void, and the faid leafe made to L. and his W. took effect by the demise, and habendum, and so was the opinion of all the justices of C. B. upon viewing all the indentures, by which the said parties proceeded to iffue upon the demife, and it was found with the plaintiff upon a verdict at large, and he had judgment with whom the author of the book was of counfel. Bendl. 39. pl. 71. Mich. 1 & 2 Ph. & M. Mount v. Hodgken.

3. It was held by all the justices that if a man leases by his deed certain parcels of land, and names them feverally, and after the leffor rafes the deed, and puts one of the parcels out of the deeds, by this all the deed is become void, for the deed is entire in itfelf, and cannot stand in part and be void in part. But whether the lessee shall have advantage to plead this as a lease by parol without pleading the deed, was made a question, and it was held by Dyer that he might, inafmuch as it was a demife of the lands, and all is of [ 179 ] one effect a leafe by parol and a leafe by deed. Mo. 35. pl. 116. Trin. 4 Eliz. Anon.

4. In an action of debt for rent, the defendant pleaded non di- 1 And. 13. misst, and the evidence proved a demise only in part, and it was pl. 29. Sly-held that it did not maintain the issue for the plaintiff. Deve of field & Uz' held that it did not maintain the issue for the plaintiff. Dyer 260. v. Sybil. pl. 22. Pafch. 9 Eliz. Anon.

cordingly.

Mo. 80. pl. 211. S. C. adjudged that the plaintiff cannot have judgment for any part, but they ought to fue again upon demife of fo much as is found to be demifed only .- Bendl. 177. S. C.

5. If an ejectment be brought of twenty acres, on a lease of twenty acres, if the defendant plead non ejecit; there, if he be found guilty but in ten acres the plaintiff shall recover; but he

should not, if defendant had pleaded non dimisit.

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6. Baron and feme tenants in tail made a lease to the defend- 4 Le. 50. ant referving rent, and the baron died, and then the wife died. C. totidem In debt by the plaintiff as heir for rent-arrear, and counted of a verbis.leafe made by the baron and feme, the defendant pleaded non di- And. 220. miserunt, and upon issue joined the jury found quod dimiserunt C. in an by indenture, and that the husband died, and that after his death action of the wife entered, and difagreed to the leafe, and within the term waste in-Anderson held clearly that by this verdict the issue was flead of dobt, and found for the defendant, viz. non dimiferunt; for it is now no the pleadlease ab initio, because the plaintiff hath not declared upon a ing and verdeed; and also by the disagreement of the wife, and her occupation of the land after his decease, she hath made it the lease of accordingly. the husband only. Le. 192. pl. 274. Mich. 31 & 32 Eliz. C. B. 3 Rep. 27. Thetford v. Thetford.

C. cited as

adjudged accordingly. - S. C. cited as adjudged. And. 350. ---

7. On non dimifit, that the leafe is void for any caufe may be given in evidence, or the special matter may be shewn. 6 Co. 67. b. Mich. 4 Jac. C. B. Finch's Cafe.

8. Upon the iffue non dimifit to an action of debt for rent upon a lease parol, the plaintiff cannot give in evidence a lease by deed, but he may give a leafe conditional, as an agreement conditional in evidence. Brown's Anal. 16.

9. In debt for rent upon non dimifit, that the leffor riens avoit in the land at the time of the demise may be given in evidence. Co. Litt. 47. Dy. 122. pl. 23. Marlaine v. Hardy.

10. Upon non dimifit modo & forma, one thall have advantage of the date and number of years. Heath's Max. 80. cites

1 & 2 Mariæ, D. 116. 11. If in an ejectment the supposed demise be laid to be after the first day within the term, although that regularly the declaration has relation to the first day of the term, yet shall not fictitious relations hurt, in case it be proved that the bill was filed after the supposed date of the lease; for it was matter of evidence, and examinable. Sid. 432. pl. 23. Mich. 21 Car. 2. B. R. Prodger's Cale.

# [Q. b. 6] Dower.

1. Upon iffue ne unques seisie que dower, the tenant may fay feilee que donver, and give in evidence a release of dower; quod tota Curia concessit. Br. General Issue, pl. 48. cites 11 H. 4.33.

2. Upon the plea of ne unques seisie que dower, the defend-Dy. 41. 2. pi. 1. Pafch. ant shall not give in evidence an estate upon condition, or other estate in the husband defeated by the remitter of the heir or the like. Heath's Max. 91. cites 30 H. 8. D. 41.

# [ 180 ]

30 H. 8.

# [Q. b. 7] Escape.

1. In debt upon escape in the Exchequer against the sheriff of Lon-Heath's Max. 80. don of fuffering a man by them arrested by ca. fa. and in execites S. C. cution to escape, the defendant cannot say that he did not escape, and give in evidence, that he was not arrested; for the arrest is confessed if he says that he did not escape. Br. General Issue,

pl. 89. cites 34 H. 8.

3. An action upon the case against a sheriff upon an escape suffered by his bailiff upon a mean process, and it was proved in evidence as necessary to make this case that there was such a debt. that fuch a process and warrant was, and a due debt, and lastly, That the party arrested was become infolvent, otherwise he should not have recovered damages to the value of his debt as here he did upon all this proved in evidence as aforesaid. Clayt. 34. pl. 59. 11 Car. Tempest v. Linley.

8 & 9 W. 3. 26. No retaking shall be given in evidence in an action of escape, unless specially pleaded, and oath made by the keeper of the prison, that such escape was without his consent; but if such

affidavit prove falfe, Such keeper Shall forfeit 500 1.

8 & 9 W. 3. 26. No retaking on fresh pursuit shall be given in evidence on the trial of an iffue in an action of escape against the marshal, warden or their deputies, or other keepers of prisons, unless the fame be specially pleaded, nor shall any special plea be received or allowed, unless oath be first made in writing by such defendant, and filed in the proper office, that the prisoner escaped without their consent or privity,

privity, and if fuch affidavit shall appear to be falfe, such marshal,

warden, or other keeper, Shall forfeit 500 1.

If the faid marshal, wardens, or their deputies, or the keeper of any other prison shall after one day's notice in writing for that purpose refuse to shew a prisoner committed to the creditor or his attorney; such re-

fufal shall be adjudged an escape.

And if any person desiring to charge a person with any action or execution, shall defire to be informed by the faid marshal, warden, their deputies, or the keeper of any prison, whether such a person be a prifoner, the faid marshal, &c. Shall give a true note in writing to such person or attorney upon demand thereof at his office, or he shall forfeit 5001. And fuch note in writing specifying that such person is an actual prisoner in his custody, shall be accepted as sufficient evidence, that fuch person was at that time in actual custody.

4. It is absolutely necessary to charge the marshal in debt for escape, that he have notice of the party's being charged in execution;

per Cur. 12 Mod. 635. Hill. 13 W. 3. Anon.

# [Q. b. 8] Non est Factum.

1. Whether upon the plea non est factum generally the defendant may give in evidence, That the plaintiff afterwards pulled the feal off from the deed, dubitatur. Brown's Anal. 16.

2. But upon non est factum pleaded, generally the defendant may give in evidence minus literatus. Brown's Anal. 16. If it was read to him different from what it really is. Vide Faits (S).

3. Two feal a deed, the feal of one is broken off. He shall fay non est factum upon the special matter, as upon a rasure or interlining, or where the man is not lettered; and this shall avoid [ 181 ] the deed, though the feal of the other remains entire. Br. Ob-

ligations, pl. 43.3 H. 7.5.

4. The like upon delivery of the deed as an efcrow. Brown's Per Hale Anal. 16 .- If the stranger to whom the deed was delivered as Ch. J. an an escrow, delivers it over to the party before the condition be given in performed; this may be given in evidence on an action brought evidence on upon this bond; per Brooke. Br. General Issue, pl. 26. cites non est fac-14 H. 8. 28.

and Wild J. doubted. 3 Keb. 142. Manning v. Bucknal.

5. If in debt on an obligation the defendant plead non est factum, and upon trial gives in evidence, That the feal of the bond was broken off, and put on again, or that any part of it was rased, it will be a good proof to bar the plaintiff. Heath's Max. 84. cites 5 Rep. 119. and 11 Rep. 27.

6. On non est factum, it is good evidence, that upon payment of a sum agreed upon by obligor and obligee, the plaintiff took the difendants feal off the faid obligation. Dy. 112. Upon Demurrer al Evidence, a. pl. 50. Hill. 1 & 2 P. & M. Peers v. Bishop.

P 4 7. But And. 4. pl. 8. S. C. cited 3 Rep. 26. 8.-

7. But if a deed had been delivered to A. to be given to the plaintiff, and the plaintiff refuses it is no evidence on non est factum; pl. 117. s. for by the first delivery it was the defendants deed, and no sub-C-s. C. sequent resulal shall have relation to available and no subdeed had been delivered to A. to be given to B. upon the performance of conditions, if A. delivers it before the performance of the conditions, the maker may plead non est factum. It is no evidence if the plaintiff is a monk, nor that he is another that bears the fame name, yet it is good evidence that the bond was made by another who bears the same name with the defendant, D. 163. 167. pl. 14. Trin. i Eliz. Taw v. Bury.

8. Carus asked the judges whether razure may be given in evidence on non est factum pleaded? Dyer and other judges anfwered not; because he thereby acknowledges the deed to have been once his deed, and avoids it by a subsequent matter, and therefore must plead specially. Mo. 66. pl. 179. Trin. 6 Eliz. Anon.

Savil. 71. Manwood v. Harris.

9. In all cases when the obligation was once his deed, and after before action brought it becomes no deed, either by razure, or addition, or other alteration of the deed, or by breaking the feal, in this case though it was once a deed, yet the defendant may fafely plead non est factum; for without question at the time of the plea which is in the present time, it was not his deed, 5 Rep. 119. b. Trin. 2 Jac. C. B. in Whelpdale's Case.

10. Coverture may be given in evidence non est factum; but infancy must be pleaded; per two justices. 3 Keb. 228. pl. 40.

Trin. 25 Car. 2. B. R. Cole v. Delaune.

11. Upon non est factum to a bond, one of the witnesses being subpanaed did not appear; and it was offered to prove that he owned it his bond, but denied. Arg. 12 Mod. 500. Pasch. 13 W. 3. Dillon v. Crawly.

12. Though seme covert feal and deliver a deed, yet she may plead non est factum, and give coverture in evidence; per Holt

Ch. J. 12 Mod. 609. Hill. 13 W. 3. Anon.

13. Infancy is not evidence to non eff factum, but coverture is,

Ld. Raym. Rep. 313. Arg. in Cafe of Thomson v. Leach.

14. Infancy, or made by durefs, cannot be given in evidence upon non est factum, Lib 5. Whelpdale's Case, 119. because thereby the bond is not void, but only voidable; otherwise the bond of a feme covert, or monk; for there the bond is void, and fo non est factum; and so of a bond made to a seme covert, and the [ 182 ] husband disagrees to it, or by husband and feme non est factum of the wife, T. per Pais, [467] 376.

# [Q. b. 9] Liberum Tenementum.

1. In trespass the defendant pleaded that the loous in quo, &c. is fix acres in D. which are his freehold; on iffue thereon, if the defendant has fix acres in D. and the plaintiff other fix acres there, the defendant cannot give in evidence that the trespass was committed in bis own land; for his plea shall be intended to refer to the plaintiff's land, for until he names specially the land, he does not vary from the plaintiff's meaning, consequently the plaintiff need not make any new affignment. Dy. 23. b. pl. 147. Mich. 28 H. 8. Anon.

[Q. b. 10] Molliter Manus Imposuit.

1. You cannot justify beating of a man in defence of your posses- Ld. Raym. sion, but you must say you did molliter manus imponere. Molliter Rep. 62. infultum fecit in defence of possession is not good, but a contra- and the Mod. 36. pl. 86. Hill, 21 & 22 Car. 2. B. R. Jones v. Court diction. Trefilian.

2. There is a force in law as in every claufum fregit, and there must be a request, but contra against an actual force. A wife may justify an affault in defence of her husband, and so may servant of his master, but \* not a master in defence of his servant, because he \* Ow. 150. may have an action per quod fervitium amisit. If a person hold con. up his hand to strike the husband, the wife may make an affault to prevent the blow; but a man cannot justify an affault in defence of his house, goods, or close, but must plead molliter manus imposuit. 1 Salk. 407. pl. 2. Mich. 7 W. 3. Leeward v. Basilee.

3. If one enters my ground, the owner must request him to depart before he can lay hands on him to turn him out; for every impositio manuum is an affault and battery, and this breaking of the close in law cannot be justified without a precedent request; but if one breaks down the gate, or breaks open a door, or comes into my close vi & armis, I need not request him to be gone, but may lay hands on him immediately; for it is but returning violence with violence; fo if one forcibly takes away my goods, I may oppose him without any more ado, for there is no time to make a request. An attempt to take or rescue any thing in my possession is an affault on my person, and a taking from my person. 2 Salk. 641. pl. 12. Ann. B. R. Green v. Goddard.

# [Q. b. 11] Ne Infeoffa pas.

1. If a man pleads feoffment of one jointenant to his companion by a strange name, or of a feme covert to another similiter, the other may fay that ne infeoffa pas, and give the matter in evidence; per Cur. and the Court shall instruct the jury of the law. Br. General Issue, pl. 73. cites 18 E. 4. 29.

# [Q. b. 12] Ne Unques Executor.

1. An action of debt was brought against J. S. executor of the testator W. he imparls, and therefore he cannot plead to the writ that he is administrator, and not executor, and therefore, by the direction of the Court, he pleaded ne unques administrator as executor, and gave in evidence that he is administrator, and not executor

agreed it to be good law.

executor per Curiam. Quod nota. Br. General Issue, pl. 61.

cites Ed. 4. 4.

\*2. On the same plea an executor gives in evidence a commission ad colligendum, in which was an authority ad vendendum; but this was an administration, and the ordinary had no authority to fell goods though they were in danger of perishing, and the brief de colligendo ought to express the proper name of the commissory or ordinary. Dy. 255. b. pl. 8. Mich. 8 & 9 Eliz. Anon.

S. C. cited 3. Upon ne unques executor, ne administer come executor, it is good evidence by defendant to produce the letters of administration Skin. 365. pl. 9. Mich. W. & M. by which he administered, and that he did not administer before the in B. R. faid letters, for then he cannot be an executor de son tort. in Cafe of Dy. 305. b. pl. 61. Mich. 13 & 14 Eliz. Anon.

Salkeld, and denied by Holt Ch. J. and Eyres, cæteris tacentibus; and Holt faid, that he shall be charged notwithflanding .- 12 Mod. 46. S. C. cited, and denied to be law; and rather an evidence charge the defendant than discharge; they might have been pleaded in abatement but it is no

> 4. Executor de son tort, pleads ne unques executor, &c. execution was against him for the whole debt, viz. 60 l. although in truth he had not meddled but with one bedftead of small value. Noy. 69. Anon. about 39 Eliz. and there faid that one Mr. Offley had been charged to 100 l. and he had meddled but with one bible, therefore take heed, and plead special matter.

> 5. If executors, after ne unques executors pleaded, may give in evidence that the parties are living? Wylde Recorder of London conceived they may; but the Court doubted. 1 Keb. 414.

pl. 120. Mich. 14 Car. 2. B. R. Anon.

6. Upon iffue of ne unques executor, forgery or other things in avoidance of the will shall not be given in evidence. Sid. 359.

pl. 1. Pasch. 20 Car. 2. B. R. Noel v. Wells.

If there be 7. In an action upon the case against the defendant for goods fold, he came and pleaded in bar, that he was executor, where the plaintiff had charged him as administrator; and upon a demurrer adjudged for the plaintiff, for it was but in abatement, for the matter is if he be chargeable or no; and though it was faid, he be fued that this was well pleaded in bar to the action, as in Robinson's Case, 5 Rep. 32. and that upon evidence of ne unques executor, he may give letters of administration in proof. Dy. 305. this was denied per Holt Ch. J. and Eyres, cateris tacentibus; and Holt faid, that this notwithstanding, he shall be charged, but he said it is otherwise of letters ad colligend. bona defuncti; but judgment in where one sues as executor, the defendant may plead by way of estoppel that he was administrator, &c. Skin. 365. Harding v. for whether Salkeld.

executor or administrator, he is still chargeable to plaintiff, and it is no plea in bar to say administrator and not executor. Cumb. 220, 221. Mich. 5 W. & M. in B. R. Harding v. Salkin. 12 Mod. 46. S. C. accordingly, per Holt Ch. J.-Skin. 265. pl. 9. S. C. accordingly.- I Salk. 298. pl. 4. S. C. held accordingly .-

> 8. But bona notabilia may.—But not that testator was non compos. Sid. 359. in S. C.

[Q. b.

judgment against an administrator by the name of executor, and afterwards as adminiftrator, for the fame cause he may give the former evidence,

# [Q. b. 13] Ne Unques fon Receiver.

1. In a writ of account as his receiver, if the defendant pleads never his receiver, &c. he cannot give in evidence, that the plaintiff bailed to him the money to deliver over to J. S. the which he has done accordingly, &c. Though this special matter proves that he is not accountable, because upon the delivery he was accountable conditionally, (that is to fay) if he did not deliver it over. [ 184 ] D. 196. b. pl. 1. cites 3 Eliz. between Sir George Speake v. Hungerford.

#### [Q. b. 14] Nil habuit in Tenementis.

1. Debt for rent upon a demise for years, the defendant pleads nil habuit in tenementis, the plaintiff replies, that he had a good, and sufficient estate to make the demise to the defendant modo & forma, &c. scil. that he was seised in his demesne as of see, upon which iffue is joined; and upon evidence it was objected, that he ought to shew an estate in fee; non allocatur, for the issue is joined upon the good and fufficient estate to make the demise; and any estate is sufficient for this purpose, out of which the estate demised may be derived; and all added after the scil. is but form; but if he had not faid, that he had a good and fufficient estate, but only faid, that he was feifed in his demesne as of fee, then he had been restrained to prove such estate; per Holt Ch. J.

Skin. 624. pl. 18. Mich. 7 W. 3. B. R. Wilson v. Field.

2. Debt for rent on a demise by plaintist to defendant; de- Ld. Raym. fendant pleaded, that plaintiff nibil habuit in tenementis, plaintiff Rep. 331. replied that he was possessed of a lease for 41 years made to him by the Lord W. who had full power to demife; and though the judgment was reverfed for a fault in the declaration; yet the replication was held good without fetting forth a title, which Holt faid was true; and that in that case it was not necessary to set out a title, for nihil habuit in tenementis was the iffue; for if defendant pleaded nihil habuit in tenementis, the plaintiff may reply, quod fatis habuit in tenementis, viz. in feodo or any other estate on the trial whereof he may give any other estate in evidence; the alledging any particular estate being only form, the issue being whether he had any thing in the premisses. 12 Mod. 191. Pasch. 10 W. 3. Silly v. Dally.

# [Q b. 15] Non Feoffavit.

1. If one plead ne enfeoffa pas, he may give in evidence that the parties were joint-tenants. Heath's Max. 80. cites 18 Ed. 4. 29.

2. In trespass, it was resolved upon evidence at bar, that where the defendant entitles himself to land, by a feoffment made to A. to the use of the defendant of a manor in which, Sc. is

percel, that that was naught, because no attornment is shown to be made to the seossie to the use of A. though it was shown that the tenants have paid their rent to the defendants. Noy. 146. Evelinge v. Sawyer.

#### [Q. b. 16] Non tenet Modo & Forma.

1. Cessavit, that he held divers lands by entire service, he did not hold in manner and form, and gives in evidence, that he holds by several services, is good, for he hath no such cause of action. Kitch. 238. 13 H. 7. fo. 24.

#### [Q. b. 17] Note of Hand.

debted to B. his brother, to whom he was not any ways indebted, and of which note B. knew nothing, but A. kept it always in his ewn custody, and on his death it was found among his papers, was decreed to be looked upon only as matter initiate, or intended and never perfected, and the Court faid, they esteemed it as no debt at all. Williams's Rep. 204. 206. Per Ld. Harcourt. Trin. 1712. Dishper v. Dishper.

# [Q. b. 18] Plene Administravit.

1. Note that if executors plead plene administravit in action of debt, and give in evidence payment of legacies, the plaintiff in the action of debt may demur in law thereupon; for such administration is not allowable in law before the debts paid. Br. Assets enter Maines, pl. 10. cites 33 H. 8.

2. Case was brought against executors; they were at issue, upon nothing in their hands; it was given in evidence on the plaintiff's part, that a stranger was bound to the testator in 1001. for performance of covenants; which were broken; for which the executors brought debt upon the obligation depending which suit, both parties submitted themselves to the arbitrament of A. and B. who awarded, that the obligor should pay to the executors 701. in full satisfaction, &c. and that the executors should release, &c. which was done accordingly. And it was agreed by the Court, that by the release it shall be taken in judgment of law, that the executors have assets to the value of the whole 1001. And although the executors were compelled by the award to make the release, yet it was their own act to submit themselves to the arbitrament. 3 Le. 53. pl. 77. Mich. 15 Eliz. C. B. Anon.

3. In debt against an administrator, and plene administravit pleaded, the judge did allow him to give in evidence judgments precedent without pleading it, and Ward Serjeant of the other side did yield to it. It was also ruled, That an acquittance shewed in evidence for 100 l. paid to a creditor is good in discharge of an inven-



tory, and if the debt was compounded for less than the acquittance mentions, this shall come on the other part to shew; and the rather it was held fo here, because this acquittance was from an officer of the King's for customs due, and they do not use to take less than is due. Clayt. 65. pl. 112. Assis. a. July 1638. before Barkley. Judge. Baraclough's Cafe.

4. In debt upon a bond against an executor, who pleads plene administravit, and gave in evidence bonds cancelled and taken in, or acquittances for money, this held not good without proof of real payments made, or new security given, &c. Clayt. 112. pl. 193.

March, 24 Car. coram Turner Serjeant. Sot's Cafe.

5. On a plene administravit, defendant cannot give in evidence of judgments &c. fince the iffue joined, nor fince the writ purchased, but these must be pleaded. For issue is whether plene administravit at that time. But though he cannot give such evidence, yet he may plead it. 3 Salk. 153. pl. 4. Hill. 8 W. 3. C. B. Anon.

6. On plea of plene administravit, a judgment was given in evidence against the testator, and that execution had been taken out against the executor, and that a third person gave a note to the sheriff for the money. This is not evidence of the judgments being fatisfied as when fatisfaction is entered upon record, or the money paid or levied by the sheriff, for on a ca. fa. the sheriff will be liable to an escape, or a fieri facias may be fued against the defendant; per Powell J. at Exeter, Lent affises 1710. Tackle v. Bingham.

7. It is no plea where he is charged in debet and detinet, because he is charged for his own occupation. 1 Mod. 185. in pl. 17.

Trin. 26 Car. 2. C. B. Anon.

8. A bond was put in fuit against an executor who pleaded plene administravit, that he was a bond creditor himself and paid himself; on a trial it appeared there was an interlineation of 501. after the bond was executed; fo at law the bond was entirely void. Now application was made, that though the bond be void at law [ 186 ] that it may be considered as good in equity for what it was really given. Chancellor, This at most can be a charge at simple contract, for you yourselves have destroyed its being as a bond, so it is as if it never had been; fo can be no bar to the payment of a debt of a superior nature. Sel. Cases in Canc. in Ld. King's time. 24. Trin. 11 Geo. Anon.

Q. Neither is it now necessary to prove the execution of the bonds, but producing the bond is sufficient, though held otherwise formerly; coram Eyre and Fortescue apud Westminster, Mich.

6 Geo.

10. On plene administravit, rent due and paid, if covenants or leafes are produced, must give evidence of their execution, or of parties being in possession and paying rent, it may be sufficient to shew the right of lessor to the rent; coram Probyn J. at Wells fummer ailises 1728.

11. A feme fole executor made a deed of gift of testator's goods in trust, but continued possession of them and married J. S. and the

baron likewise had possession of them. An action of debt is brought by a creditor of testators, and fully administered pleaded. verdict shall pass for the plaintiff upon this evidence, for this alienation being fraudulent was void to all creditors, and so as to the plaintiff the goods continued the testators, and were assets in the defendant's hands. Went. Off. Executors, 189, 190. fays it was fo held in B. R.

19. At Exeter, Lent ashses 1711, it was declared as Holt's opinion that where old bonds cancelled, and delivered up were given in evidence by an executor, the party must prove the payment of the money; but of late the practice had been otherwise, for these are sufficient of themselves, unless there be a suspicion of fraud, as when these bonds are to relations.

# [Q. b. 19] Riens per Descent.

1. An action of debt was brought against executors; they are at iffue upon affets in their hands; it is good evidence that they have fold land by the will of the testator, and have the money; and so is a recovery in trespass of goods taken in the life of the

testator. Br. General Issue, pl. 4. cites 3 H. 6. 3.

2. In an action of debt upon an obligation against an heir, if defendant pleads riens per discent, and plaintiff maintains that he has affets, it may well be given in evidence, that the defendant before the writ purchased aliened the assets by fraud, and covin to defeat the B. Pafeh. ; plaintiff, and so it is void by the statute 13 Eliz. though it was Jac. in Stan- not pleaded, because it is upon the general issue. Adjudged. den's Cafe. 5 Rep. 60. Mich. 33 Eliz. B. R. Gooch's Cafe.

3. In debt against an heir, he pleads he hath nothing in fee by descent, and in evidence it appeared he had fee, but depending upon an estate tail, and upon this a special verdict, see by me this issue against the defendant; for he ought to have pleaded this specially, and so it was done in Case of Trasord Hill. 31 Eliz. and concluded unde debitum prædictum folvere non potuit, and fee of the rent or fervice depending upon this reversion, and of what value they shall be, &c. Clayt. 49. pl. 84. Aug. 13 Car. coram

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Barkley Judge of Affife. Anon.

4. Debt against the heir upon the bond of the ancestor, &c. Riens per discent was pleaded. The heir gave in evidence an extent against him upon a debt owing by his father upon bond to the King; and it was ruled by Holt Ch. J. that a copy of the bond fworn, or the bond itself, ought to be given in evidence, the fuit being by a creditor, otherwise the extent should not be allowed. And for want of this Holt difallowed fuch extent. Summer affifes 1699. at [ 187 ] Darby. And next morning in another trial between Horne and the faid defendant Adderley, the bond acknowledged by his anceftor to the King was produced in evidence, the iffue being the fame as in the other action. Ld. Raym. Rep. 734, 735. Sherwood v. Adderley.

5. In debt against the heir who pleads riens per discent; proof

Ibid. cites 5. P. as una. nimoully agreed per totam Curiam in C.

that the father was feifed, and that the heir did enter after his death is well enough; for it shall be prefumed fee-simple, till the contrary be shewn. T. per Pais, 225.

# [Q. b. 20] Robbery. On the Statute of Winton.

1. Upon the statute of Winton in case against the hundred; the evidence must be strict ex parte quer. Many instances have been where persons have pretended to have been robbed but never were. 2dly. The character of the person robbed ought to be clearly made out, with fuch other circumstances, as may confirm his credit. 3dly. That the party robbed ought to give notice of the robbery immediately to the next constable or vill, and he need not delay it till he has a justice of peace his warrant, for this is not necessary, that a hue and cry may be levied, for the intent of the law is not else answered, this being intended for the immediate pursuit of the robbers. 4thly. This hue and cry ought not to describe the perfon by his cloaths, &c. for these may be altered, but the horse with his colour, &c. Upon a motion for a new trial, which was granted, there being fome contrariety in the evidence concerning the description of the robbers, whether they were horsemen or footpads, he foon after the declaring they were on foot to a shepherd, but swearing on the trial they were horsemen. Upon trial coram Parker Ch. J. Trin. 3 Geo. Regis B. R. Keil v. Hundred of Eltham Middlefex.

# [Q. b. 21] Son Affault Demefne.

1. M. throws a bottle at C. and C. returns another; this is justihable in C. and lawful, and though he had wounded M. he might have justified it in an action of assault and battery. For the first throwing the bottle manifests a malicious design. Kel. 128.

2. In trespass by baron and feme for battery of the feme, the de- Ld. Raym. fendant pleaded son assault demessee of the wife; plaintist replied, that Rep. 62. S. C. acthe defendant was going to wound her husband; defendant decordingly. murred and judgment pro quer. for the wife may justify an affault in defence of her husband; so may a servant of his master, but not a master in defence of his fervant, because he may have an action per quod fervitium amisit, nor can a man justify an assault in defence of his freehold, house, or close, but can only say molliter manus imposuit. 1 Salk. 407. pl. 2. Mich. 7 W. 3. B. R. Leeward and Ux' v. Bafilee.

3. On fon affault demesne, the evidence was that there had been some contest about taking sea sand near Penzance, and the wife of one of the persons objecting, &c. strikes with her fift a man loading fand in pots on horseback; words arise and the woman attempts to let the fand fall out of the pots by taking out the pin, but the man shoves her from him, and then beats her very much, but the judge held this could not be given in evidence to maintain this issue, for though it was a continuing of the first quarrel, and if the woman

had been killed it would have been but manssaughter, not se desendendo, because this last beating cannot be justified. Holt Ch. J. always held that if one strikes me, and then runs away, and I follow and beat him; in an action for this, I cannot plead son assault demesses, for the words of the plea are, insultum secit & ipsum werberasse voluit per quod defendans seipsum erga quer. ad tunc & ibidem desendebat, &c. Hill. Vac. 1716. Coram Eyre Ch. J. at Launceston.

4. In affault and battery against four; all pleaded son affault demesse; evidence that the plaintiff struck one first, and then another, and then a third, and then a jourth. Every defendant ought to have pleaded singly, and as the plea was joint the affault ought to have been proved. Per King Ch. J. at the Castle at Exon. 1716.

[Q. b. 22] Nul Tort.

1. In attaint in assiste the tenant cannot plead feefment upon condition without deed, but shall say nul tort, and shall give this in evidence, and the jury is bound to find this in pain of attaint. Br. General Issue, pl. 72. cites 18 E. 4. 12.

2. Affife by a woman of certain land the defendant shall not plead discontinuance by the baron, but shall say no tort, and shall give the matter in evidence. Br. General Issue, pl. 64.

cites 45 Aff. pl.

For this re2. In an affise if the tenant pleads no tort, no disseisin, he lease after the disseisin cannot give in evidence a release after the disseisin, but he may give in evidence a release before the disseisin, for then upon the plied conmatter there is no disseisin. C. L. 283.

diffeifin, and repugnant to the plea of no tort no diffeifin. Jenk. 18, 19. pl. 35.

4. If the lessor releases to the lessee for years, and his heirs, and the lessee upon ousling of him after the said release brings an assiste against the lessor, the jurors upon evidence of the said release may find no disseisin, for the release was before the supposed disseisin. Jenk, 10, pl. 25.

5. So upon the general issue in an assiste the recognitors may find a feoffment upon condition, and that the plaintist entered for the

condition broken. Jenk. 19. pl. 35.

6. In an assis if the tenant pleads nul tort, nul disseisin, he cannot give in evidence a release after the disseisin, but a release before the disseisin he may, for then there is no disseisin upon the matter. Tr. per P. [467] 376.

# [Q. b. 23] Nul Waste.

1. Waste, no waste done was pleaded, he may give in evidence, that the house was burnt by the King's enemies, or by thunder, or it was ruinous at the time of the lease is good; or that it fell either by wind or tempest. Br. General Issue, pl. 46. cites 12 H. 8. 1.

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2. Waste was affigned in boscis, viz. in succidendo, & vendendo decem quercus, &c. and the truth was, that the defendant had but lopped and shred the oaks. Whether he may safely plead no waste done, and give this special matter in evidence? And it feems that he well may, as the waste is assigned. D. 92. a. pl. 16. Mich. 1 Mar. Anon.

3. In waste assigned in domibus; the defendant pleaded nul 5 Rep. 119. waste done, and gave in evidence, that the houses were sufficiently per Car. repaired before the action brought; the Court held, that this evi- and fays, dence maintains the iffue, but he should have pleaded it in bar, that the because now it is confessed that there was once a waste. D. 276. ought to

a. pl. 51. Trin. 10 Eliz. Anon.

plead the special mat-

ter, and cannot plead nul waste done, for the entry is in the præter tense, viz. Quod non fecit vastum .-

4. Waste was affigued by Altman in fodendo fossam in quodam [ 189 ] prato, the defendant pleaded no waste done; and it was found by He may a special verdict, that the defendant made the trench to drain the thing of the water, per quod pratum melioratur & non pejoratur. And it was fame kind, faid for the plaintiff by Mead, that this matter ought to have been asbydigging pleaded in bar, but by the opinion of the Court it is no waste. a meadow to make a D. 361. pl. 12. Hill. 20 Eliz. Altman v. -

carry away water .- Hob. 233.

5. In an action of waste in an house, if defendant pleads no He cannot waste done, he cannot give in evidence that it was sufficiently re- give in evidence justipaired before the writ purchased, because the waste is acknow- fiable waste, ledged at one time, and therefore ought to plead in bar. 2 Roll. as repairing Trial (E. f.) pl. 3. cites D. 10 El. 276. pl. 51.—and 5 Rep. the house, &c. is, but 119. b. Whelpdale's Cafe.

he may give in evidence

anything which proves it no waste, as by tempest, lightning, enemies, &c. Co. Litt. 283. So he may give in evidence that they were ruinous at the time of the leafe,

6. In an action of waste, upon the plea nul waste fait, he may give in evidence any thing that proveth it no waste, as by tempest, by lightning, by enemies, and the like; but he cannot give in evidence justifiable waste, as to repair the house, or the like. If one does waste, and before the action brought the lessee repairs it, and after the leffor brings an action of waste, and the lessee pleads quod non fecit vastum, he cannot give in evidence the special matter. Co. Litt. 83. a.

7. In a dispute between the lord of a manor and a customary tenant about opening a copper mine (where no fuch ever was known to be before) and felling the ore, it was proved that the tenants had used to cut timber from off the premisses, and also to dig stone and fell it. Ld. Chanc. Cowper said, as to the evidence that the tenant might do one fort of waste, as to fell timber and dispose of it, this might be by special grant; but that it is no evidence that the tenant has a power to commit any other fort of waste of a different Vol. XII. Species,

species, or that of disposing of minerals. Wms's Rep. 406.

Hill. 1717. Bishop of Winchester v. Knight.

8. But a custom impowering the tenants to dispose of one fart of mineral, as coals, may be an evidence of their right to dispose of another fort of mineral, as lead out of a mine. Ibid. 408.

# (R. b. 1) Proved in Evidence, what must, or may be in, or as to the Plea.

#### Affumplit.

1. A CTION upon the case that the desendant promised to the plaintiss that if the plaintiss would discharge J. T. of such execution in which he is at the suit of the plaintiss, that then if the said J. T. did not satisfy the plaintiss by such a day, the desendant would do it, and counted accordingly, and they were at issue upon non assumptit, and the evidence to the jury in proof of the assumptit, and the truth of the matter also, was that the desendant promised the plaintiss wife in the plaintiss's absence, and when the came to his wife he agreed to it, and discharged J. T. without speaking with the plaintiss, and per tot Cur. upon good argument the action upon the case lies. Br. Action sur le Case,

pl. 5. cites 27 H. 8. 24, 25.

2. When an action upon the case on affumpsit is brought, and two considerations or more are laid in the declaration, but they are not collateral but pursuant, as A. is indebted to B. in 100 l. and A. promises B. that in consideration he owes him 100/. and in confideration that B. shall give him 2 s. that he will pay B. the 100 !. fuch a day, if B. brings his action upon this affumpfit, and declares on these two promises, though the consideration of the 2s. be not performed, yet the action lies; but if they are collateral confiderations, which are not purfant, as if I, in confideration that you are my counsel, and shall ride with me to York, promise to give you 20 1. here all the considerations must be proved, otherwise the action cannot be maintained. Arg. fays, this difference was taken by all the justices in B. R. 19 El. Le. 296. pl. 105. 28 & 29 Eliz. B. R. in Cafe of Crifp v. Golding .- If a promise is founded on two considerations, and plaintiff declares on one only, he shall never have judgment. Le. 300. pl. 410. Hill. 31 Eliz. B. R. Simms v. Westcott.

3. Upon an indebitatus assumpsit, the evidence ought to be contract or receit without deed, and not a specialty, as an obligation, or deed of lease and arrears, for he ought to sue upon the spe-

cialty. Mo. 340. pl. 460. Mich. 34 & 35 Eliz. Anon.

4. Indebitatus affumpfit, upon non affumpfit pleaded, the plaintiff shall not give any matter of specialty in evidence to prove his debt, as a bond, indenture of lease, &c. because he may bring an action of debt upon specialty, but he ought to give in evidence

evidence matter of contract or receipt without deed. Mo. 340.

pl. 460. Mich. 34 & 35 Eliz. Anon.

5. If in affumpfit upon two confiderations, the one is good, and the other idle, if that which is good be proved, it is fufficient, and though he fails in proof of the other, 'tis not material, because it is vain to alledge it, and it is as if it had not been alledged. Cro. J. 127. pl. 19. Trin: 4 Jac. B. C. Crifp v. Garnel,

6. In a cause in Chancery the King under his sign manual cer- Godb. 198 tified to the Ld. Chancellor a promise made to him in behalf of ano- Prin. ther, and this certificate was allowed good evidence. Hob. 213. Jac. S. P. pl. 271. about the 9th Jac. Lord Abigny v. Lord Clifton.

the Court of

Requests accordingly in the Case of Lea v. Lea .-

7. Assumplit upon an accompt, and the proof was, that the plaintiff's fervant did demand fuch fum prout, &c. of the defendant, who did acknowledge the debt, and this was holden good evidence, quod notas Clayt. 98. pl. 165. Affize Aug. 23. 1641. Whitfield J.

8. Upon non affumpfit pleaded to an action upon the case, defendant may give in evidence that the promife was conditional, or he may plead the same without traverse. Brown's Anal. 15.

9. In affumplit for 201. debt, upon the evidence it did appear that part of the money was paid, and the judgment did hafitare if the plaintiff had not failed in his whole case, because the confideration is not as he hath made his case to be, but after he was fatisfied the law was otherwise, and gave direction the plaintiff should recover the residue of the money not paid, but it feems otherwife where the confiderations were feveral, as for the price of a horse sold to the defendant, and for money lent, and one action for both, there both must be proved to be due. Clayt. 145. pl. 264. March 1650. Linley's Cafe.

10. The plaintiff had taken a diffrefs for rent, and the defend- [ 191 ] ant promised, if he would re-deliver it to him, he would pay the sum demanded for rent; the diffress was delivered, and now he fued for the money upon the promise, and the plaintiff in this case was put to prove there was rent due, &c. Nota; for I did not doubt, because the defendant hath benefit by re-delivery of the diftress, &c. Ergo. Clayt. 139. pl. 250. Assife Aug. 1649.

Thorpe J. Gower v. Wilkinson.

11. Where an indebitatus is brought for divers goods and merchandizes fold and delivered, there it is requifite for the plaintiff to prove more goods than one particular thing fold, and also to prove a price agreed upon, otherwise the action will not lie. But where 2 quantum meruit is laid, there he needs not to prove any price agreed upon, but only the delivery of the goods, and the value of them at the time of the delivery. Therefore it is most secure always in an action for goods fold, or work done, to lay a quantum meruit with an indebitatus affumpfit; but if only one particular commodity fold, there you must mention the commodity fo fold particularly in the declaration, and not fay goods fold. L. P. R. 117.

12. In

S. P. admitted by Hale Ch. J. affumpfit. 1 Salk. 279. pl. 4. Pafch. 5 W. & M. in C. B. Darby and there- v. Boucher.

upon the plaintiff was nonfuited. 2 Lav. 144. Trin. 27 Car. 2, B. R. Seafon v. Gilbert,—Vent. 170. Mich. 2; Car. 2. S. P. by Hale Ch. J.—

13. In an action grounded upon a promise in law payment before the action brought is allowed to be given in evidence upon non assumption. But where the action is grounded upon a special promise, there payment, or any other legal discharge must be pleaded.

1 Mod. 210. pl. 82. Hill. 27 & 28 Car. 2. C. B. Fits v. Free-stone.

14. In case on non assumpsit the statute of limitations has not been given in evidence, for it speaks of a time past, and relates to the time of making the promise. I Salk. 278. pl. 1. coram

Holt Ch. J. at Nisi Prius at Hertford. 1690. Anon.

15. In assumptit the defendant pleaded, quod ipse performavit omnia ex parte sua performanda, and it was ruled, that this amounts only to the general issue. Quære, for the assumptit is admitted, so that this is but a discharge; and quære of the case of Hatton and Morse, if it be not contra. I Salk. 394. pl. 3. Mich. 2 Ann. B. R. Sea v. Taylor.

16. Assumptit for meat, drink, &c. found by the plaintiff for the defendant; upon evidence it appeared, that it was found for the defendant's apprentice, and not for himself; and held that the plaintiff could not recover upon this general count. Coram Prat Ch. J.

apud Guildhall. Mich. 5 Geo.

# [R. b. 2] Non Affumpfit infra fex Annos.

1. An acknowledgment of the debt within fix years was fuffi426. Anon.

S. P. held cient to revive it, and to prevent the statute, though no new proaccordingly, mise was made. And this was held sufficient to maintain the
and seems to be S. C.—
is mod.

12 Mod. give any new cause of action, but only revived the old cause, and was
223. S. C. of no other use but to prevent bar by statute of limitations. Carth. 471.
held accordingly.—

Mich. 10 W. 3. B. R. Heylin v. Hastings.

[ 192 ] 2. Non assumptit infra sex annos to an action as executor. On a 6 Mod.3c9 trial proof was, that there was a new promise made within six years, Mich. 3 but it was a promise made to executor, not to testator. Et per Cur. R. S. C. he should have declared accordingly. 1 Salk. 28. pl. 16. Mich. the Court 3 Ann. B. R. Dean v. Crane.

here the executor might declare of a promife to himself; sed adjornatur; and in Hill. Term upon conference with all the judges, it was held that the evidence did not maintain the declaration. So on this plea if evidence be, that goods were fold above fix years ago, and that the defendant being requested to pay denied that he bought the goods, but further said, Prove it and I will pay you; here this promise, though conditional, as the condition was performed doth revive the debt, and will bring it back again within the statute, for the defendant waves the benefit of the act, as much as by an express promise. 1 Salk. 29. pl. 19. Hill. 13 W. 3. B. R. Heyling v. Hastings.

3. Lent

3. Lent Assises 1717. Exon. coram Baron Price, plaintist declared on a note dated 16 years ago. Plea non assumptit infra fex annos; evidence that the defendant did own the note within six years, saying he did acknowledge it to be his hand, and it was ruled sufficient to bring the case within the statute.

#### [R. b. 3] Non Concessit.

1. The iffue ne dona pas may be maintained by a devife. And upon a feoffment, a leafe and releafe are good evidence. Heath's

Max. 80. cites 15 E. 3. Bro. 95.

2. If advoruson be pleaded to be granted by deed, and iffue is taken by a stranger to the deed, that he did not grant by the deed, if it can be proved that he granted it without deed, as it may be (as there is held) or by other deed it is good, because the deed is surplus, and the effect of the iffue is upon the grant, and not the deed. 43 E. 3. I. b. 2.

3. In waste brought by the grantee of a reversion, the lesse may plead that he in reversion did not grant by his deed, or that nothing passed by his deed, and give in evidence that he never made atternment, or he may traverse the atternment; per Knightly and Fitz-

herbert. D. 31. a. pl. 215. Hill. 28 H. 8.

4. In a formedon upon non dedit, it is good evidence that the donor had nothing in the land at the time of the gift; for he cannot

traverse that he had nothing at the time of the gift. Dy. 122. b. pl. 23.

5. An issue in trespass was, whether or no dominus concessit fecundum consuetudinem manerii? And the evidence was, that the lord had lately granted, but never before that time; the jury here must find non concessit; for although in truth concessit, yet non concessit fecundum consuetudinem manerii, which was the point in issue. Le. 55, 56. pl. 70. Pasch. 29 Eliz. C. B. Kempe v. Carter.

6. If nothing passes by the King's letters-patents, it is a good plea, that non concessit per literas patentes. For if nothing passed, then by consequence non concessit. 4 Rep. 71. b. Trin.

33 Eliz. C. B. in Hynd's Cafe.

7. In debt for performance of covenants defendant pleaded the grantee of a rent-charge had granted it over, and issue thereupon, and found for defendant, and moved in arrest of judgment, that no attornment is shewn; and it was held per three justices to be good, and well aided by the statute of jeofailes, and though issue may be taken either upon the grant or upon the attornment, yet the issue upon one being found, the other is implyed. D. 31. b. marg. pl. 215. cites 33 & 34 El. B. R. Gourny v. Sr. Edward Cleere.

8. If nothing passes by the King's letters, one may plead non concessit, and give the invalidity in evidence. 6 Co. 15. b. Mich.

36 & 37 Eliz. B. R. Eden's Cafe.

. But in ejectment of a manor, which confifted of demelnes, rents and fervices, &c. an attornment must be proved, because the rents and fervices could not pass without it. 3 Mod. 36. Mich. 35 Car. 2. B. R. Smith v. Goodier.

10. On non concessit to a grant of a reversion, you need not prove an attornment, for the traverling the grant is an admittance of the other. 1 Salk. 90. pl. 2. Mich. 5 Ann. B. R. Hudson v. Jones.

#### [R. b. 4] Non Debet.

1. If the defendant pleads nil debet to an action of debt upon a contract, he may give in evidence that the contract was conditional, or he may plead the same without traverse. Brown's Anal. 15.

2. Debt for the fale of a horse for 40 s. the defendant may plead nil debet, and give in evidence, that the fale was of two horfes for 40 s. 4.2. S. P. or of an ox for 40 s. and good. Brown's Anal. 16.

4. Debt upon arrearages of account (the defendant faid) that he S. P. cites owes him nothing in manner and form, and evidence that there was 20 H. 6. 24. no fuch account is good, for he hath no fuch cause of action. Kitch. 238. 2 H, 6. fo. 26.

> c. Debt upon arrearages of rent upon a lease for years, he owes him nothing, and evidence that he did not demife is good. Kitch, 237. cites 7 H. 7. fo. 3. But I do not observe it there.

6. The defendant upon nil debet may give ne lessa pas in evi-

dence. Heath's Max. 79. cites 9 H. 7. 3.

7. In debt for rent on a lease parol, the defendant pleads riens luy doit, he may give in evidence any matter to shew the title out of the plaintiff; sed contra, where the defendant pleads riens arrear, fuch plea tacitly admits a title in the plaintiff. 9 H. 7. 3.-But I do not observe it there.

3. One had leafe for years of land of a stranger rendring rent, and for the arrearages brings debt, the defendant pleads, that he caves him nothing, and may give in evidence, that he never was feifed of the land; but if he pleads riens arrear, or levied by diffress, he cannot give in evidence as before as it feems. May fay, he did not leafe. Roll. Trial. 677. pl. 21. 7 El. Tr. 9 H. 7. 3. May fay, ne lessa pas.

9. In debt upon an account, the defendant may plead nullum tale computum, or nil debet, and give in evidence, that there is no account

between the faid parties. Brown's Anal. 15.

But a de. 10. Debt for the arrears of rent upon lease for years, upon nil mile of part debet per patriam pleaded, it is good evidence to prove quod non dionly does misit. Brown's Anal. 16. not maintain the

iffue. D. 260. pl. 22. Bendl. 177. Slyfield v. Sibil. Mo. 80. S. C .- And. 13. S. C.

11. In debt upon a lease, defendant pleaded payment, and in evidence shewed he paid it to sequestrators of the Commonwealth, the plaintiff being a delinquent, and ruled this was good payment to prove the iffue, which was a payment to the plaintiff himfelf,

Br. General Itiue, pl. 44. eites as E. Br. General . Clayt. 129. pl. 231. Assise Mar. 1648. before Thorpe Serjeant,

Judge of Assife. Anon.

12. If he who has rent-fervice or rent-charge, accepts rent due at And there, the last day, and thereof makes acquittance, all the arrearages due porter adds, that in the before are by this discharged. 3 Rep. 65. b. in a nota by the Case of Reporter fays, that it was so adjudged in C. B. Hill. 10 Eliz. rent-service Hopkins v. Morton.

who receives it is not compellible to make acquittance; but the doing it is his own voluntary act to

which the law does not compel him.

13. In debt for rent, on reference to the secondary to see if all were [ 194 ] paid ex motione Hanes, he reported, that a note of receipt of the last half year's rent was shewed in discharge of all former arrearages; but per Cur. this is only evidence of all, but it is no discharge of the former arrear unless it be under hand and feal, and then but by estopple, whereupon, paying costs, a new trial was agreed to stand on payment, without entring into the title. 2 Keb. 346. pl. 25. Paich. 20 Car. 2. B. R. Coomes v. Denne.

14. In debt for rent, if the defendant pleads nil debet, he may S. P. by give entry and expulsion in evidence; arg. faid to have been the Mod. 3 opinion of the judges, and the Court now did not deny it. pl. 83. Hill. Mod. 118. pl. 18. Pafch. 26 Car. 2. B. R. in Brown's Cafe.

R. Anon .- Sid. 151. pl. 18. Trin. 15 Car. 2. B. R. in a nota fays, that it was fo faid in the Cafe of Drake v. Beere. Vent. 258, Pafch. 26 Car, 2. S. P. accordingly in a nota there .-

15. In debt for rent on nil debet pleaded, the flatute of limitations may be given in evidence (for the statute has made it no debt at the time of the plea pleaded, the words of which are in the present tense. I Salk. 278. pl. I. Coram Holt Ch. J. at Nisi

Prius at Hertford 1690. Anon.

16. Debt for 10 l. pro eo quod cum the defendant had accounted with the plaintiff of divers fums as due, and upon that account was found in arrear 81. per quod actio accrevit to have the faid 81. cumque etiam the faid defendant had borrowed of the faid plaintiff 10% to be paid on request, de quibus quidem separalibus denarior fum'. this defendant afterwards fatisfied 81. yet the 101. bath not paid, plea nil debet. On the trial they gave in evidence only 8 1. It was urged, that could not be evidence of the mutuatus, for that was one entire contract, and another contract for 81. was not the fame they had declared upon, and of that opinion was the Lord Ch. J. Holt. Show, 215. Pafch. 3 W. & M. Styart v. Rowland.

17. In nil debet, a release is good evidence. 5 Mod. 18. Hill.

6 W. & M. The King v. Grove.

18. If a citizen is chosen sheriff of London, and the mayor and al- Mod. 438. dermen refuse a reasonable excuse, the party is not bound by such resuch mod 269.

fusal, because he may give it in evidence upon nil debet pleaded in an 272. S. C. action of debt brought for the forfeiture, and there the validity of the and S. P. excuse will be tried by a jury. Carth. 483. Pasch. 11 W. 3. accordingly. B. R. London City v. Vanacker. 496. 500. S. C. and S. P. accordingly.

[ 195 ]

19. In case of a by-law on debt for sorfeiture à reasonable excufe of refusal may be given in evidence on non debet. Carth. 483. Pasch. 11 W. 3. B. R. London City v. Vanacker.

20. Levied by diffress et sic non debet, payment or release is good evidence, otherwise of rasure. I Salk. 284. pl. 15. Trin. 12 W. 3.

B. R. Gallaway v. Sufach.

3 Salk.27 1. 21. In debt the defendant may plead a release, because it admits pl. 7. S. C. the contract, which is a colour of action, and yet he might give it held acin evidence upon nil debet. Per Holt Ch. J. 1 Salk. 394. pl. 2. cordingly. I Ann. B. R. Hatton v. Morfe.

3 Salk. 273. 22. So in affumt fit the defendant may plead payment, because it pl. 7. S. P. in S. C. by admits the affumpfit, and yet he may give it in evidence on non al-Holt Ch. J. fumplit; so was the principal case, and so ruled per Holt Ch. J. 1 Salk. 394. Hatton v. Morfe.

23. In trespass on not guilty the defendant cannot give in evidence, that the place was an highway. I Salk. 287. pl. 24. Mich. 5 Ann. B. R. Watson v. Sparkes.

24. On riens arrear nothing is to be given in evidence, but payment or non payment. Per Holt Ch. J. Holt's Rep. 567. pl. 46.

Mich. 8 Ann. in Case of Willet v. Waxcomb.

25. Defendant on fuch plea may give in evidence, that the rent day was not incurred. Per Powell J. Holt's Rep. 567. S. C.

#### [R b. 5] Non Detinet.

1. Upon the plea of non detinet, the defendant cannot give in

evidence a mortgage. Brown's Anal. 15.

2. Neither can the defendant upon fuch iffue give in evidence, that he had the thing of the plaintiff as a pledge for money not yet paid. Brown's Anal. 16.

3. But quære, If he may give in evidence an agreement after the bailment? That doth alter the property. Heath's Max. 79.

But defend-4. In a detinue of a pledge, if the defendant pleads non detinet, he ant may give in evi. shall not give in evidence how it is his pledge, for it is special matdence a gift ter. 20 H. 75. 22 H. 6. 33. b. 9 H. 7. 4. b. for the property roun the continues generally in the pledger. Roll. Trial, (E.f) pl. 9. th.t proves that he detains not the plaintiff's goods. C. L. 283.

# [R. b. 6] Debt upon Bond against an Heir.

1. In debt on bond against an heir, he pleaded riens per def.ent. The verdict went against him, because he omitted bringing the settlement to the trial. Cited by Holt Ch. J. 2 Salk. 647. pl. 16. Mich. 10 W. 3. B. R. in Case of Witts v. Solehampton,

as in a case which he said he remembered.

2. Debt upon bond of 1400 !. The defendant pleaded the statite of usury; and upon a trial of it issue being joined, before Trevor Ch. J. of C. B. the Sitting after the Term at Westminster, the question was, whether the plaintiff should be compelled to give in evidence a specification? And this point was reserved

for his opinion at his chambers. Where afterwards it was argued by Serjeant Hooper for the plaintiff, and by Mr. Raymond for the defendant; and he held clearly the negative, because the bond was admitted by the plea; and where the party is not bound to give the bond in evidence, he is not bound to give in evidence the specification. And the postea was delivered to the plaintiff. Raym. Rep. 852. Hill. 1 Annæ. Puered v. Duncombe.

# [R. b. 7] Ejectment.

1. In an ejectment of lands in Kent, it was agreed, that if land be alledged to be in Kent it shall be prefumed to be gavel-kind land, if the contrary is not proved; but that the special customs incident to gavel-kind ought to be proved; as that the husband shall be tenant by the curtefy without having iffue, &c. 2 Sid. 153. Pasch. 1659. B. R. Brown v. Broker.

2. When he that fued an elegit brings an ejectment to try the title, he must in evidence shew the elegit filed. L. E. 263. pl. 28.

cites Try. per Pais, 191.

3. Per Hale Ch. J. if A. lets to B. and B. to C. to try the title, [ 196 ] the general confession extends only to the lease made to C. not to that to B. 1 Vent. 248. Mich. 25 Car. 2. Anon.

4. A will exemplified under the Great Seal is not evidence to a jury in ejectment. Per Cur. Cumb. 46. Pasch. 3 Jac. 2. B. R. Anon.

5. Per Cur. 20 or 25 years possession is a good title in eject-

ment as well as a bar to an ejectment.

6. Where the lessor of the plaintiff has a special title as to enter for a condition broken where there is no estate till entry, there needs no actual entry to be proved, but the general confession will fupply it; fo is the modern practice though fome books are al contra. Vent. 248. 332. And agreeable hereto was the opinion of Hale. Holt Ch. J. accordingly. 1 Salk. 259. pl. 13. Mar. 26. 1702. at the Affises. Little v. Heaton.

7. Scire facias by administrator upon a judgment in debt against 6Mod. 236. terre-tenants reciting the judgment; execution awarded; elegit Mich. inquisition and lands extended; on an ejectment it was held that the S. C. the judgment upon the scire facias was a sufficient title, and the and judgfirst judgment need not be given in evidence. I Salk. 276. ment accordingly. pl. 4. Mich. 3 Ann. B. R. Trevivan v. Lawrence.

-3 Salk.

151. pl. 1. S. C. accordingly .-

8. In ejectione firma upon not guilty, upon evidence to the jury at the bar the case was such that Cotewell had a lease for years of the prebend of Sutton-Regis in the county of Bucks made in the time of H. 8. and being expired, he now claimed under a lease from a nominal prebendary thereof founded in the cathedral of Lincoln: but the plaintiff claimed by letters patent thereof from King James, made the seventh of King James to Brent

Brent and his heirs, who granted the fame to the widow of Sir W. R. whose daughter and heir Sir Gervase Elwes married; and the possession was according to this grant; whereupon the question was, if they ought to flear bow it came to the Crown? Hale Ch. ]. faid that the statute for confirmation of patents, Jac. takes notice that prebend did come to the King. And in Edward the First's time was a devise, that all that claimed terra Regis should shew how it came to the Crown, which often vanished away, &c. L. E. 263. pl. 30, cites T. per Pais, 230.

9. In late times in a trial at this bar, Mr. Latch did nonfuit the plaintiff upon a claim of monastery lands, although he proved the boufe had it, because he did not make out how it came to the house; but fince that time, the Court have intended it well come to the house, the possession having gone accordingly with it. L. E. 263.

pl. 30. cites Tr. per Pais, 230.

10. And he faid he was of counfel in a trial at bar for an impropriation, where it was infifted, that it was presentative till Edward the Fourth's time, and could not be appropriated without the King's licence; quod Cur. concessit; and he could not produce the licence; yet because it was enjoyed ever since Edward the Fourth's time as appropriate the Court did intend a licence, and that the patent was last before the eurollment, and accordingly the verdict went. L. E. 263. pl. 30.

11. Then the defendant offered to read a copy of a leafe out of the ledger-book of the dean and chapter of Lincoln, but it was difallowed by the Court, for the book itself is but a copy; and a copy of a copy is no evidence. And in this case the Court did prefume the grant to be lost; and thereupon judgment was for the

plaintiff. L. E. 264. pl. 30. cites Try. per Pais, 230.

12. It has been ruled in evidence at the affifes, that a cottager on the lord's waste lives there by the lord's confent, and so is only [ 197 ] a tenant at will, but this is very doubtful where there has been a

long possession. Per Prat Ch. J. Mich. 11 Geo. B. R.

13. The plaintiff was lord of the manor of Ewell in Surry, and brought his bill claiming an house in Ewell built upon the wafte, it was faid by Ld. Chancellor, that the lord of a manor is never faid to be out of possession of what is built upon the waste that is bis, and that upon a trial before Judge John Powell touching fome cottages or tenements built upon the waste, though the lord had not been in actual survey of the cottages or tenements in question for 60 years, and there had been several fines levied. thereon, by the opinion of the judges the lord had a verdict. 13 July 1726, in Canc. Lloyd v. Bartlet.

# [R. b. 8.] Ejectment of a Rectory.

1. A rector to entitle himself in an ejectment brought of a rectory must give in evidence admission, institution and induction. adly, His reading and subscribing the articles. 3dly, His declaration in the church (within the time limited by the statute) of his full

Where the induction was a good while after the inflitufull and free affent, and confent to all the things contained in the book of tion, the Common Prayer. Sid. 220. pl. 8. Mich. 16 Car. 2. B. R. Snow is not eviv. Philips. dence of a presentation. 1 Vent. 14, 15.

2. But it is not necessary to give in evidence the title of the presenter, for the institution upon the sitle of a stranger is sufficient title against him who has the right in an ejectment, though otherwise in a qua. imp. Sid. 221. S. C.

#### [R. b. 9] Estoyers.

1. In an action of trespass for taking away timber, the defendant pleaded a custom within the manor, to have the same as estovers to be burned in terris & tenementis; and issue being taken on the custom, the defendant gave evidence only of a custom as to the messuage; and it was adjudged, that this evidence did not maintain the issue. Godb. 234. pl. 326. Mich. 11 Jac. C. B. The Bishop of Chichester and Strodwick's Case.

# [R. b. 10] Parco Fracto.

1. Where in parco fracto the defendant did plead not guilty, and gave in evidence, that the plaintiff had not a park by prescription, nor by grant, and it was held good. Heath's Max. 77. cites 18 H. 6. 22.

# [R. b. 11] Per quod Servitium Amisit, &c.

1. Trespass for beating his servant need not be an bired servant Clayt. 115. according to 5 Eliz. but one hired for any certain time. A person pl. 202. hired to load corn, not entertained in plaintiff's house, but 1647. went every night to his own house, is not a servant within Green Serthis action. Clayt. 133, 134. pl. 241. Aug. 1649. Thorpe J. jeant. East-Linley v. Baxter.

Cafe. S. P.

2. Where a trespass is laid with a per quod, &c. as for instance, per quod servitium, &c. or per quod consortium uxoris amisit, there whatever comes under the per quod must be proved, otherwise the plaintiff cannot have a verdict, because that is the [ 198 ] gift of the action; admitted. 8 Mod. 372. Trin. 11 Geo. in Case of Philips v. Fish.

# [R. b. 12] Policies of Infurance.

1. Condition of a bond was, that after arrival of a ship from such and such places, that A. Should pay ten pounds, and twelve pence per month for every pound for every month; and if the faid ship be driven back, flayed or hindered by distress of weather, or leakage, to that the return not, then upon payment of ten pounds condition to be void. Defendant pleads, that by reason of the perils of the sea, the said ship was drowned in the sea. The question was, whether this was an hindrance within the words of the condition, and holden it was; but Pemberton said, that if they had been taken by the Turks, or perished any other ways than by leakage, or distress of weather, and that had been set forth in pleading it would not have been within the condition; judgment for the plaintiss. Skin. 3. pl. 4. Mich. 33 Car. 2. B. R. Pim and Elliot.

2. In trover for a ship and cargo, the envoice and bill of loading was given in evidence, the which was opposed; because though it be evidence between the freighter and the mafter, yet in this case, the freighter and master are but as one person, and it shall not be evidence against a third person; non allocatur; for the bill of loading is always read in case of a policy to prove goods on board, (the which was admitted, but not to prove the value) and here though the certainty of the value does not appear, yet infomuch that the goods were proved to be bought and paid for by the plaintiff, and to amount to fuch a fum, and that the envoice and bill of loading agreed, and that they were entered, as put on board fuch a ship, and that they were carried to the place where the ship was taken, and that when the ship was taken there were fuch goods on board; and the master being dead, his hand to the bill of loading was proved, and the master if he was present might be sworn; and therefore in this case they might prove his hand; for these reasons the bill of loading was read; upon the reading of which it was objected, that the cargo was shipped by A. and B. and company, and B. being dead, the action brought by A. only is ill, because it appears, that others have an interest who ought to be named; non allocatur; for it does not appear, and this ought to be proved, (but in this cafe it feemeth as if it might be presumed) and if there are others, this is a matter in abatement, and it ought to be pleaded; and the difference is, where it is an action founded upon a tort, as here, and not guilty pleaded, and where it is founded upon a contract; for there it is non affumpfit, because it is another contract, but the party may make a tort joint and several; and if a man bring trover for a ship, and upon the evidence it appears, that he has but the fixteenth part of it; this is good, and the interest of the others may be given in evidence in mitigation of damages. Skin. 640. pl. 4. Pasch. 8 W. 3. B. R. Dockwray v. Dickenson.

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3. In an action upon the case upon a policy, the which warranted the ship shall have four passes, soil. A pass from the King of England, from the King of France, from the King of Poland, and the States of Holland, and the goods were to be the goods of such a Polish subject on board the ship, vocat. the City of Warsaw; an action upon the policy being brought, it appeared upon the evidence, that the passes bore date in April or May, and that the ship to which they applied these passes then was reguant.

regnant. & vocat. by another name, and that she was not named the City of Warfaw before the August following; and therefore these were not good and effectual passes for this ship, according to the guaranty of the policy, the which intended good passes, and not elusory vain passes, and they being a fraud upon [ 199 ] the fubscribers, the policy shall not bind them; also another objection was made, the which was, that the passes were for goods that belonged to the subjects of the King of Poland, and fo retained only to them; but the goods on board were not of the fubjects of Poland, but of Holland, and therefore not within the intent of the policy; it was also insisted, that the policy being for goods of fuch a one without account, they ought to prove that they had any goods on board, or had shipped any goods by order of a third person, though being without account they need not prove the particulars; and that so was the practice, which was not contradicted; per Holt Ch. J. Skin. 404. pl. 41. Mich. 5 W. & M. in B. R. Anon.

# [Q. b. 13] Possessory Actions.

1. Though all declarations for stopping of ways, diverting of Birt v. water-courses, and disturbances in commons are now drawn and Strode. S. founded upon the possession without shewing of a title, yet upon C. and the general iffue, the plaintiff must prove his title or be nonfuit; and judgment the fetting out the title against a avrong doer it is but matter of in- error. ducement. 4 Mod. 421. 423. Pasch. 7 W. 3. B. R. Strode v. Skin. 621. Birt.

S. C. cited as adjudged accordingly. Ld. Raym. Rep. 266. - Vent. 274. Mich. 27 Car. 2. B. R. Saintjohn v. Moody. S. P .- Ibid. 319. Mich. 29 Car. 2. B. R. Saunders v. Williams, S. P .-

# [R. b. 14] Quantum Meruit.

1. Assumptit for the price of a beast, the plaintiff declared that the agreement was to pay fo much as the beaft should be reafonably worth, and the witness proved the agreement to be, that the defendant would give content for it; and this was ruled good evidence to prove the promife laid, and in common fenfe the words amount to so much. Clayt. 148. pl. 271. Affise Aug. 1650. before Baron Thorpe Judge of Nisi Prius, Bland v. Tenant.

2. So on an indebitatus affumpfit for wares fold, and no evidence should be given of an agreement for the certain price. Twisden said he should direct it to be found specially. I Mod. 295. pl. 39. Trin. 29 Car. 2. B. R. Jemy v. Norrice.

3. In a quantum meruit for rent, and non assumpsit pleaded, an express promise must be proved. 3 Lev. 150. Trin. 34 Car. 2. in C. B. Johnson v. May.

4. Assumplit, on confideration that he had assumed to serve Show. 342, defendant as commissioner to examine witnesses in a suit betwixt him v. Collingand B. that defendant promised to pay him for his pains. It was ton, S. C.

adjudged that the action lies. Salk. 330. pl. r. S. C. held accordingly.

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alledged, that a commissioner could not have an assumption such a promise, for he ought to be indifferent, and it is unlawful to be paid for such service; [as a promise, in consideration that plaintiss would take a special warrant and arrest, to pay such a sum, is void. Noy. 78.] [If a man, in consideration of money, undertakes to do execution, it is not good. 2 Cro. 103.] But per Cur. a commissioner is named by the party, and it is intended he would favour him, and therefore it is a challenge to the favour that he is a commissioner at the denomination of the party, though no principal challenge. I Inst. 157. b. And a commissioner takes pains to attend the examination of witnesses, and therefore deterves recompence as well as a commissioner of bankruptcy; and there is a difference between him and a sheriss. Judgment proquer. 12 Mod. 9. Mich. 3 W. & M. Stockwell v. Collison.

5. If A. promifes B. 10 l. in confideration that he would procure him one who would give him an annuity of 100 l. per ann. for 900 l. B. does not do it, but procures him one who grants it for 1000 l. and A. does agree for that annuity. B. cannot bring assumption for the 10 l. because this varies from the contract; but he may have a quantum meruit. 12 Mod. 509. per Powell J.

Pasch. 13 W. 3. Anon.

6. A contract cannot be given in evidence upon a quantum

meruit. Baron Price, Lent affises at Devon. 1717-18.

7. A curate to one Vinicomb rector of Bigbury in Devonshire, brought and maintained a quantum meruit for his serving the cure. Devon. Ass. Lent, 1734-5.

# [R. b. 15] Trespafs.

tona afportavit, the defendant in truth committed the trespass by virtue of the commission of bankruptcy; and it was faid by the Court, that because the plaintist declared for an entry into his house, the defendant cannot plead not guilty, and give the special matter in evidence, but must plead the commission of bankruptcy, and all the special matter; but if it had been for the taking of goods only, he might have pleaded not guilty generally. Quære rationem, Lit. R. 356. Hill. 6 Car. C. B. Anon.

2. In trefpass with a continuando, it was holden upon the evidence, that it is not needful to prove a re-entry, in case the action is brought against the first trespassor, as it ought to be done where it is against a stranger, as against feosfee, &c. of the first trespassor. Clayt. 5. pl. 8. August, 7 Car. before Damport, Ch. B. Ander-

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3. In trespass, the place where is in a common field, in a place called The Two Furlongs, this is good without abuttals, which are dangerous to prove; and if abuttals be in such a case as this of one or two sides the parcel of ground, it is sufficient to declare the place; and here one witness spake to the trespass, and another to the abuttals, and the other knew those, but not that it was the plaintiff's

fand; this does not make a perfect evidence, and it was directed to be the best in such a case as this for both to go to the land before, and he that fand the trespass to shew the place to the other who knows the abuttals. Clayt. 108. pl. 184. Affifes April, & Car. Whitfield Judge. Brodebent v. Chadwick.

4. For making a trefpass continuando, there ought to be a re-entry of the plaintiff, and for the not proving thereof the plaintiff shall have damages only for the first entry. Tr. per Pais, 234. Cites Mich.

22 Car. 1.

5. Trespass was laid the first of May with a continuando, &c. and the plaintiff could not prove the first trespass, though he could prove the diversis vicibus after, and for this cause he was nonfuit; for the first trespass is the main. Clayt. 141. pl. 256. August, 1649. before Thorpe J. Walker v. Dawson.

6. In trefpafs with a continuando to recover mefne profits, an entry and possession of the land before the trespass must be proved, and also

another entry after the trespass. Tr. per Pais, 199.

# [R. b. 16] Trespass with a Continuando.

1. In trespass for breaking his close with a continuando, it was moved by Coke, that the plaintiff needed not to shew a regress to have damages for the continuance of the first entry, scilicet, for the mean profits, and that appears by common experience at this day. Gawdy J. faid, that whatfoever the expe- [ 201 ] rience be, I well know that our books are contrary, and that without an entry he shall not have damages for the continuance, if not in case where the term or estate of the plaintiff in the land be determined, and to fuch opinion of Gawdy the whole Court did incline, but they did not refolve the point, because a regress was proved. Le. 302. pl. 416. Trin. 31 Eliz. B. R. Rawlin's Case, and cites 20 H. 6. 15. and 38 H. 6. 27.

2. Trespass was laid with a continuando from such a day till fuch a day, the party is not obliged upon evidence to prove the precise time alledged in the continuando; but he ought to prove a trespass at some time within the time alledged in the continuando; but if he will wave the continuando, and give the fingle trespass in evidence, he may. Skin. 641. pl. 5. Pafch. 8 W. 3. Wilson v.

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3. Though it is the practice in trespass for the mean profits, to lay a trespass at one day, and give damages in evidence done at several days, that is not law, and ought not be allowed; but in such case it ought to be laid diversis diebus & vicibus, and then several trespasses may be given in evidence. Per Powell J. Ld. Raym. Rep. 240. Trin. 9 Will. 3. in Case of Fontleroy v. Aymer.

4. Where the plaintiff was ousted and made a re-entry he may bring trespass, and declare that he entered such a day continuando, &c. or that he entered fuch a day, et diversis diebus & vicibus between fuch a day and fuch a day. 2 Salk. 639. pl. 7. Hill. 1 Ann.

B. R. Monkton v. Pathley.

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Ld. Raym. Rep. 977. Trin. 2 Ann. S. C.

5. Of acts done which terminate in themselves, and once done cannot be done again, there can be no continuando, as bunting or killing a hare, or 5 hares, but that ought to be alledged that diversis diebus & vicibus inter fuch a day and fuch a day he killed 5 hares, or cut and carried away twenty trees; and where a trespass is laid in continuance which cannot be continued, exception ought to be taken at the trial; for he ought to recover but for one trefpass; per Holt Ch. J. The Court held that hunting might be continued as well as spoiling and confuming his grass, or cutting his grafs. 2 Salk. 639. pl. 7. Hill. 1 Ann. B. R. Monkton v. Pashley.

[R. b. 16] Trover.

- 1. In trover plaintiff ought to prove property of goods in him, and at least a demand and refusal, and if there be several parcels, the orderly way to give evidence, is to make an inventory of them, and prove the property of the goods mentioned in it, and demand and refusal of them. Per Holt. 12 Mod. 344. Mich. 11 W. 3.
- 2. In trover on not guilty pleaded, every thing may be given in evidence except a release; there may be a special plea in trover, and a matter of law may be pleaded. Per Cur. B. R. Hill. 6 Geo.
- (S. b) Where the Onus Probandi lies on the Plaintiff, and where on the Defendant.

1. ISSUE directed out of Chancery was, whether land affigned for payment of a legacy were deficient in value, and iffue was joined upon the deficiency; the one alledging, that it was not; and per Cur. though averring that it was deficient is such an af-[ 202 ] firmative as implies a negative, yet it is such an affirmative as turns the proof on those that plead it; if he had joined the issue that the lands were not of value, and the other had averred that they were, the proof then had lain on the other fide. 12 Mod. 526. Trin. 13 W. 3. Berty v. Dormer.

2. And if one plead infra atatem, which is no more than that he is not of age, and iffue is thereupon; he that pleads the infra ztatem must prove it; per Cur. 12 Mod. 526. in S. C.

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3. A. gives B. a policy to receive 100 l. if Saragoffa were not in the bands of King Charles fuch a day. In an action on this wager, non affumplit was pleaded, and after the policy had been proved, an objection was made, that the defendant ought to prove, that Saragossa was in the hands of King Charles, and that the plaintiff was not to prove the breach of the policy it being in the negative, and it was ruled by Parker Ch. J. at Guildhall London Trin. 9 Ann. And though it was objected in my Ld. Hallifax's Cafe in an information in Scaccario for not transmitting ordinario impressos rotulos into the Remembrancer's office, &c. the proof laid upon

the profecutor; but the Court faid, there is a difference, for this was to charge a man with an omission, or neglect in his duty or office, &c. Per Parker Ch. J. at Guildhall Trin. 9 Ann.

4. 6 Geo. cap. 21. Prohibited or customable goods, if feifed, &c. proof of duty paid, or condemnation, &c. lies on the claimer,

Erc.

5. Where a plea is in the affirmative, the proof lies upon the defendant. 8 Mod. 180. Trin. 9 Geo. Hilliard v. Phaly.

# (T. b. 1) What shall be Evidence of what.

#### Accessory.

1. TWO three or more doing an unlawful act, as abusing the passers-by in a street or highway, if one of them kills a paffer-by, it is murder in all, and whatever mischief one does they are all guilty of it; and it is lawful for any person to attack and suppress them, and command the King's peace; and such attempt to suppress, is not a sufficient provocation to make killing, manslaughter, or fon affault demesne a good plea in trespass against them; per Holt. 12 Mod. 256. Mich. 10 W. 3. Ashton

2. Such as actually accompany another in the execution of an unlawful act, are as much principals as the very actors. As feconds in duelling. Quære tamen. Hawk. Pl. C. cap. 31. pl. 31.

[T. b. 2] Acting as an Alderman, Justice of Peace, &c. without qualifying themselves.

Is Information for exercifing office of alderman and justice of Worcester, not taking the oaths within three months after his election to be alderman; not guilty pleaded; tried at bar. Proof by town clerk, that he was chosen alderman such a day; then copy of the entry in the Court-book of Worcester was offered in evidence for the King, which being opposed, Holt said, Now here, to prove that defendant acted as an alderman and justice, you must not only shew the record (for perhaps he is not concluded by that entry in a criminal case) nor can you prove it by witnesses only, for then the defendant may object, Here is the record; so that it must be proved both ways. Then a copy of the entry in the Court-book was read; but the [ 203 ] names of the persons before whom the Court was held were not set down; and Holt faid it could not be proved by witnesses or parol who fet as judges; but if it had been faid coram A. mayor, and B. and C. aldermen & cæteris aldermannis, it might have been supplied by parol evidence, but here no one is named; and Sr. Samuel Eyres J. being fent to C. B. they were all of the fame opinion, that it ought not to be admitted in evidence. Then they gave in evidence an order for relief of the poor under defendants hands as to not receiving the facrament within three VOL. XII.

months; objected, that could not be fecundum formam statuti without producing a certificate; Holt Ch. J. said, the want of a certificate is equally penal; but it is a distinct offence with which the defendant is not charged. N. B. The mayor adjourned the session from the 8th to the 22d January, which was the first day of the sessions if within the three months and before the 22d. For though the sessions be all but one day, yet they may, and often do enter their adjournment Session inchoat. tali die & continuat' usque ad talem diem. Comb. 337, 338. Trin. 7 W. 3. B. R. The King v. Hains, Alderman of Worcester.

# [T. b. 3] Administration.

1. Title being made to a term by one as administrator, no letters of administration produced; the book of the Ecclesiastical Court where it was granted, being produced wherein was entred the act or order of the Court for granting it was allowed good evidence. Lev. 25. Pasch. 13 Car. 2. B. R. Garret v. Lister, said by Twisden to be the Case of the Earl of Manchester.

2. Twisden said he had seen administration given in evidence after the seal broke off, and so of wills and deeds. Mod. 11. pl. 34.

Mich. 21 Car. 2. B. R. Clerke v. Heath.

3. The very point of Hargrave's Case, 5 Rep. 31. was agreed and resolved. And that that case was after reversed in the Exchequer-Chamber, but it was for another cause; and Williams said, That he had viewed the very record of that case accordingly, in which case is, if A. brings debt against B. as administrator to J. S. without saying that J. S. died intestate, yet it is good; for it may be that J. S. made a will and testament, and yet administration might be committed to the desendant by resusal, &c. But otherwise it is where the plaintist is administrator, there he ought to shew that party died intestate. Noy. 137. Sr. Richard Franck's Case.

## [T. b. 4] Age.

1. Exemplifications of depositions taken in Chancery to prove a per-

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son's being of age allowed of. Dy. 301.

2. To prove the nonage of a person that made a will an almanack was produced, in which his father had wrote his nativity, and it was allowed to be strong evidence. Raym. 84. Mich. 15 Car. 2. B. R. Herbert v. Tuckall.

3. Where a person will take upon himself to trade and act as of age, he ought to be presumed to be of age, and no evidence of parish registers ought to be admitted against it; said to be the opinion of Trevor Ch. J. and Parker Ch. J. Per Page J. Exon. Ass. Autum. 1728-9.

[ 204 ]

## [T. b. 5] Agreement.

1. In affife, it was found by verdict, that two coparceners of a moor made pur-party, and one leafed her part to A. for term of life,

who leased his part to three at will, who pastured the foil of the other coparcener, and cut wood, and mowed rushes, and the other coparcener quitted possession, and brought affise against lessee for life, and against two of the tenants at will; and it was found alfo, that the tenant at will manured the foil to the use of the leffer, but the leffee for life had nothing of the profits, and that the other parcener might have taken the profits if she would, and that the leffee for life did not command his tenants to take the profits, nor know any thing of it, but he agreed to what they had done, as the jury thought, inasmuch as after that he knew that the tenants at will had occupied by the manner, he did not cause them to make gree; and per Cur. this is no agreement, and therefore the leffee for life is no diffeifor, and also one of the tenants at will is not named, who by this act is a diffeifor and tenant at will with the others; therefore by award the plaintiff took nothing by her writ. Br. Affife, pl. 345. cites 37 Aff. 8.

2. An agreement reduced into writing, and variant from the parol agreement, shall not be explained away by giving the parol agreement in evidence, and the jury ought to have no regard to this parol agreement. Vide the Case of a Policy of Insurance. Skin. 54. Trin. 34 Car. 2. B. R. Kaines v. Sir Robert Knightly.

3. The authorities are many in the Court of Chancery, that 10 Mod. bonds have been considered as evidences of agreements, and obligors held to a specifick performance, and not allowed to forfeit the Canc. by penalty. 10 Mod. 515. 518. Mich. 10 Geo. per Parker Chanc. Parker C. in Cafe of Parks v. Wilson.

in Case of

where the condition of a bond was for performance of a marriage agreement, and decreed that the obligor should not be permitted to forfeit the penalty, but that the bond should be construed as an evidence of the agreement.—Nels. Ch. Rep. 205. Pasch. 1692. Holtham v. Ryland. S. P. held accordingly by Ld. C. Somers.—2 Wms's Rep. 224. per Ld. C. Macclessield, Mich. 1724. Cane nel v. Buckle.

4. A person cannot declare upon a general agreement, and give in evidence a special one; per the Ch. J. at Guildhall. Rep. in B. R. 303. Hill. 2 Geo. 2. Pitt v. Norman.

5. The plaintiff brought his action upon a special agreement entered into by the defendant, whose brother was in execution in the Fleet for running of goods. The agreement given in evidence upon the opening of the cause was only verbal; that the plaintiff should endeavour to procure the defendant's brother a pardon; and that, in consideration of this, the defendant should give the plaintiff 10001. if he succeeded, and what his labour was worth if he should not. The defendant upon this produced a bond of 20001. in evidence, with condition that the defendant should give the plaintiff and one Mrs. Henville 1000 l. if the pardon should be produced in fix months. This bond indeed was fince cancelled; but the coufel faid it drowned the first agreement; and an agreement is in its own nature a thing intire, and therefore it shall not be intended that one part of it was put into writing, and the other not. The plaintiff however defired to give farther evidence, that the intent of the bond was only to reduce one part of the agreement in writing, as it was the chief, chief, and to bring Mrs. Hattenville to witness this. The defendant's counsel objected against her evidence, as she was one of the co-obligees, and therefore interested with the plaintiss. However the Court allowed to give both these matters in evidence Barnard. Rep. in B. R. Trin. 2 Geo. 2. Brown v. Hatch.

## [ 205 ]

#### [T. b. 6] Alia Enormia.

Keb. 787.

1. In trespass quare clausum & domum fregit, & alia enormia ei intulit, on nul culp. Per Curiam, where a matter arises ex turpi causa, (viz.) an injury per defendant to the daughter of the plaintiff under colour that he would marry her, &c. the act may be given in evidence upon such a declaration under the (alia enormia) because the law will not compel the party to shew it of the defendant came a suiter to his daughter.

which damages shall be given ought to be pleaded, as in trespass for taking a horse, &c. nothing shall be given in evidence, but what is expressed in the declaration.

1 Sid. 225. pl. 17. Mich. 16 Car. 2. B. R. Sippora v. Basset.

was the cause of great damage given; the Court conceived that this may well be given in evidence, without saying quod insultum secit super filiam, &c. and so of the wise, but this is the better way; and judgment for the plaintiff.—The alia enormia shall not be intended of collateral matter, but of matter incident to the act done; per Roll Ch. J. Sty. 202. Hill. 1649. in Case of Watson v. Norbury.

2. If a man is charged with two particular facts in an indictment, and divers other crimes in general terms; if the two particular facts are not proved nothing can be given in evidence on the alia enormia, or the general charge.

## [T. b. 7] Alien.

1. Upon issue of alien or not, it is no evidence that in deed of bargain and sale, he called himself a freeman, and so likewise in a fine, or that he traded, though 22 H. 8. cap. 8. prohibits under pain of all their goods; for a denizen can only be made by patent or parliament, and therefore ought to be proved by matter of record, and if the letters of indenization are lost, he may have a constat. 2 Bulst. 33. Mich. 10 Jac. St. Olave's Case. So that proof by apellation is none at all.

## [T. b. 8] Alien in Fee.

1. In a consimili casu, the demandant may count of an alienation in fee, and if the alienation be traversed mode & forma, he may maintain his issue by an alienation in tail for life, because they are all alike material. Hob. 105. per Hobart Ch. J. Arg. Trin. 13 Jac.

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#### [T. b. o] Answer.

1. In some cases, if a man put in two answers, it is not sufficient to produce and prove a copy of one of them; per Powell J. Lent Affifes, Devon. 1710.

#### [T. b. 10] Affets.

1. Where the iffue is upon affets en mains del executor, it is good evidence for the plaintiff to fay, that he fold the land by the appointment of the testator, &c. Heath's Max. 82. cites 3 H. 6. 3.

2. If the iffue is affets at fuch a place, it is good evidence to prove affets at another place; for affets any where are affets every

where. Mo. 47. in pl. 147. Pafch. 5 Eliz.

3. Upon plene administravit the issue being that defendant had [ 206 ] affets die impetrationis brevis originalis, viz. - die - It is not necessary that the plaintiff in evidence produce the original, or a copy thereof; for the day of the teste is admitted in pleading; per Windham and Twisden J. and if it were over-ruled at the trial a bill of exceptions ought to be tendered, but this was not a reason for a new trial, for by the opinion of the Ch. J. in Middlesex the plaintiff was nonfuited. 1 Sid. 226. pl. 21. Mich. 16 Car. B. R. Rogers v. Rogers.

4. In debt by husband and wife against an executor, who pleaded plene administravit, and upon iffue it was proved that executor had discharged a debtor of the intestate out of Ludgate, taking a bond from him for the debt; and it appeared that he was fo extreme poor that he was downright starving, yet the debt was adjudged affets in the executor's hands. Besides the executor had not an inventory, and therefore it was faid that they ought to in-

tend affets. 12 Mod. 346. Mich. 12 W. 3. Anon.

- 5. In debt upon bond brought against the defendant as heir to his father, &c. riens per difcent pleaded, the plaintiff replied affets, and iffue thereupon. And the evidence was, that the obligor, the defendant's father, devised to the defendant his fon and heir certain meffuages in Exchequer-alley in fee, but chargeable with an annuity, or rent-charge payable to the defendant's mother; and it was held by Holt Ch. J. that these messuages descended to the defendant, and were affets, for (by him) the difference is, where the devise makes an alteration of the limitation of the estate, from that which the law would make by descent. Ld. Raym. Rep. 728. Emerson v. Inchbird, cites Trin. 13 Will. 3. B. R. Guildhall, London.
- 6. Action of debt upon a bond against an executor, who pleads plene administravit; the plaintiff's counsel gave into Court the inventory taken in the Spiritual Court, and put it upon the defendant to discharge himself. Holt said, that where in the inventory it was fet down desperate debts those shall not be affets, unless the plaintiff can prove that the defendant has received them. But thofe R 3

those debts which are not set down desperate, whether arrears of rent, or any other, shall be accounted assets, whether paid or not. 11 Mod. 225. pl. 21. Pasch. 8 Ann. B. R. Anon.

7. A person having a judgment against the ancestor is no witness to prove assets upon riens per descent. Per Baron Price. Devon

Aff. 1716, Lent.

8. Bonds not received and of long standing are evidence of affets, unless cause is shewn, why the executor did not call them in. At Devon Assises, Lent 1719. Coram King Ch. J.

o. Trees in a nursery are no affets in the hands of an executor.

At Devon Lent Affises 1735. Coram Reynolds Ch. B.

#### [T.b. 11] Affumplit in Respect to the Statute of Frauds.

1. On non assumpsit pleaded to an indebitatus assumpsit brought, the plaintiff cannot give in evidence a specialty as a bond or lease by indenture and reat arrear; for he may have action of debt on the specialty, but he must give in evidence matter of contract or receipt without specialty; per tot. Cur. præter Gawdy. Mo. 340. pl. 460. Mich. 34 & 35 Eliz. B. R. Anon.—Vid. Cro. J. 505. Bennus v. Gildly.

Cro. F. 2. Master delivered corn to his fervant to fell, who does accord-638. pl. 37. Holiday v. Holiday v. Hicks. S. money. Noy. 12. cites 40 Eliz. B. R. Holliday v. Higgs.

C. adjorna-

tur.—Ibid. 661. pl. 9. S. C. adjudged for the plaintiff.—Ibid. 746. pl. 25. Hill. 42 Eliz. S. C. in Cam. Scace. and judgment reversed. The declaration was, that he casualiter perdit the money, and when he had lost the possession thereof, he had lost the property also, because it cannot be known.

[ 207 ] 3. Per Mountague Ch. J. if a citizen of London promifes to his daughter's husband to give him a child's portion by the custom of London, the evidence between the wife and the children is certain enough, and it is known how much every child shall have. 2 Roll. Rep. 104. Trin. 17 Jac. B. R. Anon.

4. In evidence to a jury it was held, that proclamations whereby the lord claimed forfeiture, ought to be proved viva voce, and not only by the Court-rolls. 1 Keb. 287. pl. 98. Pasch.

14 Car. 2. B. R. Pateson v. Danges.

5. In debt on award, the plaintiff counted of a mutual agreement and submission ad performand' an award, which was made, that the defendant should pay 50 l. to the plaintiff, et super reception' inde, the plaintiff should deliver up writings and give a general release; and per Hyde and Cur. the mutual submission is no promise in itself, but only an evidence of it. 1 Keb. 599. pl. 72. Mich. 17 Car. 2. B. R. Tilford v. French.

6. A wife in confideration, that L. would permit her to enjoy, &cc. till Lady Day, &cc. promifed to pay the rent in arrear at her husband's death, and also so much for the time; as to first part it is void being within the statute, and being void as to one part it cannot stand good as to the other; for it is an entire agreement, and the action could not be brought for one sum

only

only without variance from the promise. Note, it did not appear that the widow was executrix or administratrix to her 2 Vent. 223-4. Mich. 2 W. & M. in C. B. Ld. Lexington v. Clarke.

7. In an action for the profits of an office, it is not necessary to shew every particular sum received by the defendant, but it is good evidence for the damage to shew the profits of the office communibus annis. 2 Vent. 171. Pasch. 2 W. & M. in C. B.

Earl of Mountague v. Ld. Preston.

8. S. brought action against A. B. and C .- A. promised Comb. 362. 8. S. brought action against A. B. and C. profiled S. C. A. in consideration the plaintiff would not profecute the action then, &c. was a party (it being at the affifes) he would pay 101. and the costs of fuit. concerned Action lies on his promise notwithstanding the statute; for this in the forcannot be faid to be a promise for another, but for his own debt. mer action, and this is Mod. 205. Pasch. 8 W. 3. Stephens v. Squire.

an original

promise, and A. himself was liable.

o. At Guildhall; in an action upon the case upon mutual agreements the evidence was, a note in the nature of a bill of parcels to this purpose, Bought by Anne Knight of - Hopper hundred pieces of muslins at 40 s. per piece, to be fetched away by ten pieces at a time, and paid for as taken away. It being objected, that infomuch there was not any promife to deliver the goods, and the plaintiff accounted upon fuch a promise, that he had failed, it was answered that the agreement being to pay 201. when ten pieces were taken away, and fo for every ten pieces; that this implies a promise to deliver them, the which seems to be reason; but a promife was proved to this purpose, and so a verdict for the plaintiff. Skin. 647. pl. 5. Trin. 8 W. 3. B. R. Knight v. Hopper.

10. Assumptit upon 20 Car. 2. cap. 3. where the plaintiff has As to the an action against the party for whom an undertaking is, there no promise beaction will lie against the undertaker, without the promise be in ing is never writing; fecus where no action doth lie against the party; for pleaded, asit then the whole credit is entirely upon the account of the under- ought to be, taker, and the other is looked upon as his fervant, and the fale but pleaded and contract is in judgment of law to the undertaken the fale on trial. and contract is in judgment of law to the undertaker, though Cumb. 163. the delivery be to the other party as is fervant; i. e. upon the Mich. I W. original contract or agreement, but this difference does not hold & M. in B. where the action is upon a matter collateral to the contract, there R. Lee v. an action lies. 6 Mod. 249. Mich. 3 Ann. B. R. Bourkamire Bashpole.

v. Darknell.

11. A man promised to pay a certain sum upon the return of a Ship which happened not to return in two years after the promise made, and on a question, whether this was within the statute of frauds and perjuries, whereby no action is to be brought upon any agreement that is not to be performed within one year from the making thereof, unlefs in writing, &c. and held by all the judges, that it was not within the statute, which extends only to fuch promifes, where, by the express agreement of the party, R 4

the thing is not to be performed within a year. 1 Salk. 280.

pl. 5. Pafch. 5 W. & M. in C. B. Anon.

12. In assumptit upon a note for 10 l. 15 s. given by the defendant to the plaintiff; and non assumpsit pleaded, upon trial the plaintiff produced and proved the note. The defendant in discharge of himself produced the record of a foreign attachment, wherein the faid debt was attached by the city-process for the fatisfaction of a debt demanded there of the plaintiff, and was there condemned; and it was ruled by Trevor Ch. J. that this was a good discharge; but that if the plaintiff in this action could have shewed the original, which he declared to be precedent to that attachment, fo that it had appeared that this Court was possessed of an action for the demand of this debt before it was attached, then should the plaintiff have recovered his debt notwithstanding such evidence; but the declaration in the record here was betwixt the time of the attachment and the condemnation. I Salk. 201. pl. 32. Coram Trevor Ch. J. at Nisi Prius. Savage's Case.

13. If a person seeing a surgeon assisting another that had received hurt in one of his limbs, says to him, Pray take care of the man, or Do your best for him, or When will you come again, &c. these expressions do not make the speaker liable to pay the surgeon; it amounts to no employment; contra, if another should direct a surgeon to take care of a man, &c. or use any other expression, whereupon the surgeon should lay out money and expences, and cure the man, &c. Devon, Summer 1710. Coram Parker

Ch. J. at Nisi Prius. Palmer v. Barret.

14. In action on a promise the plaintiff may give a bond made to him in evidence of it. Per Parker Ch. J. 10 Mod. 30. Trin.

10 Ann. B. R. Michel v. Reynolds.

15. If a man enters into a bond, and does not perform the condition, the obligee may bring an assumptit, and give the bond in evidence of it. 10 Mod. 30. Trin. 10 Ann. B. R. in the Case

of Michil v. Reynolds.

16. Indebitatus affumplit on play at basset. The promise as laid, was to pay the money to each other, which each other should lose; the evidence was, that the defendant having lost his money did promise to the plaintiff to pay him what money he should lose by bills in London. Baron Price seemed of opinion that it was not sufficient evidence, &c. Case stated, Wells. Lam. 1711.

Langdon v. Herbert.

17. So in the Case of Corke and Baker, which was tried coram J. Powys at Lewes in Sussex, which was that the defendant promised the plaintiff to marry her within a twelve-month after the death of his father. A case was made of it, and argued coram C. B. who determined it not to be within the statute upon the same reason neither was it within the other branch, which says the defendant shall not be answerable for the debt or miscarriage of another, or upon any agreement on consideration of marriage, unless in writing.

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18. A promissory note is prima facie evidence since the statute, nor is it necessary to prove the consideration of it; but yet fraud, cheat, \*extortion, or satisfaction may be given in evidence by the defendant to avoid it; if the consideration was to be proved the act would signify nothing, and though the note be without any consideration, yet the note will be good; per Parker, Ch. J. Hill. 3 Geo. B. R. Appleby v. Beadle.

made, that fince the flatute a promiffory note could not be given in evidence on a count for money lent, &c. as evidence thereof, but it was in nature of a specialty, it was ruled e contra; for the plaintiff may declare upon the note if he will, or give it in

evidence.

20. At Bodmyn, Lammas 1716, an objection was, that the note which was given in evidence, was given upon terms which were not performed, & allocatur, per Baron Price; BALLET v. BARLY. And one BALDWIN'S Case before Holt Ch. J. was cited, where above an 100 l. being lost at play, the loser having a bill of exchange endorses it, and then the indorsee bringing his action, on trial it was ruled, that the contract being made void by the gaming act, it might be given in evidence. So it may where a note is made upon an usurious contract.

21. A mistress sent her servant to market to sell barley; when he returned his mistress asked him what he had done? he answered that he had fold, &c. and when she asked him for the money, he said, she need not trouble herself about that, he would be answerable to her for it if not paid, &c. Coram Price at Lanceston, Autum. Cir. 1720. It was held not to be within the

statute.

22. Overseers undertake to pay for the cure of a poor person to a surgeon, there must be evidence of an express promise to maintain the action. Price B. at Lanceston, Sum. Ass. 1729.

## [T. b. 12] Attaint.

1. What was not given in evidence to the jurors shall not Dy. 212. 2. be admitted to be given in evidence in attaint, and so the plaintiff pl. 34. a. Pasch. 4 was nonfuited. D. 129. b. pl. 65. Pasch. 2 & 3 Ph. & M. Eliz. it was Heydon v. Ibgrave.

the defendants in the attaint give new matter in evidence to inforce the first verdict, which was not given in evidence before to the first jury, that the plaintiff in the attaint shall have answer to it, and disprove it as he can, but he cannot give other evidence, nor inforce the evidence first given with more matter than was disclosed before.

## [T. b. 13] Augmentation of Vicarages.

29 Car. 2. cap. 8. feet. 3. Every archbishop, bishop, dean and chapter shall before the 29th of September next, cause every lease or grant whereupon such augmentation is made, to be entered in a book of parchment to be kept by their registers; and every other ecclesiastical person

person shall cause every such lease, &c. made by himself, or his predecessions, to be entered there, for which no fee shall be paid, save only 5 s. at most to the clerk; which entry being examined by the respective archbishop, bishop, &c. and by them attested in the said book to be a true copy, and that the augmentation was for such use, shall be as a record, a copy whereof proved by witnesses shall be evidence at law.

in pursuance of this act shall be entered in a book, and the entries being approved and attested by the governors, shall be taken as records.

#### [ 210 ]

#### [T. b. 14] Bailiff of a Manor.

1. In account against B. generally as his bailiss of the manor of S. he pleaded, that he was receiver absque hoc that he was bailiss. The plaintiss, to prove him bailiss, gave in evidence a custom in that manor for the freeholders yearly to elect at their Courts there a person called the part-reve of the abbot's rents of his frank tenants, to collect rents ratione tenura, and that such elected person used to account, and have allowance before the abbot's auditors, and said, that the defendant was chosen, &c. The defendant demurred on this evidence, and per opinionem Curiæ it will not maintain the action, for the count against him is as bailiss generally, and the evidence charges him specially by reason of his tenure, therefore he should have made a special count. Keil 76. a. pl. 23. Mich. 21 H. 7. Bucksast (Abbot) v. Horswill.

## [T. b. 15] Bankrupts.

1. 5 Geo. 2. cap. 30. f. 41. Upon petition of any person, the Lord Chancellor may order such commissions, depositions, proceedings, and certificates, to be entered of record; and in case of the death of the witnesses proving such bankruptcy, or in case the said commissions or other things shall be lost, a copy of the record of such commissions or things, signed and attested as herein mentioned, may be given in evidence to prove such commissions and bankruptcy, or other things; and all certificates which have been allowed, or to be allowed, and entred of record, or a true copy of every certificate signed and attested as herein mentioned, shall and may be given in evidence in any courts of record, and without surther proof taken to be a bar and discharge against any action for any debt contracted before the issuing of such commission, unless any creditor of the person that bath such certificate shall prove that such certificate was fraudulently obtained.

2. There is no need to produce at the trial the petition made to the Ld. Chancellor, because it may have been by parol, though the practice has been otherwise. Ld. Raym. 741. ruled by Holt Ch. J. at Lent Assissant Thetford, Kirne v. Smith and al.

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## [T. b. 16] Caufing or Procuring

1. In an action on the case brought for a false return of a mandamus, the plaintiff was put to prove that the defendant caused the return to be made, which he did in this manner, viz. he proved that the defendant was personally served with an alias mandamus; and that he told the person who served him with this writ, that he would take care a return should be made; and farther, two rules of Court were produced, viz. one for an attachment against the defendant for not making a return, and the other to discharge that rule for an attachment upon payment of costs, and appearing to the action, &c. And this was admitted to be good proof as to that matter, and the plaintiff had a verdict. Carth. 229. Pasch. 4 W. & M. in B. R. Vaughan v. Lewis.

## [T. b 17] Clerk in Orders.

1. Whether a man be clerk in orders or not is triable by his Per Holt Ch. J. 12 Mod. 452. Pasch. 13 W. 3. in Case of Wilmot v. Tiler.

#### [T. b. 18] Common.

[ 211 ]

I. In an action of trespass, the defendant justified, by reason that Br. Comhe, and all those whose estate he had, had common in the place for mon, pl. he, and all those whose estate he had, had common in the place for 35. S. C. fo many beasts beyond the memory of man; and the parties were Br. General at iffue on the prescription, and the plaintiff gave in evidence that Iffue, pl. 96. he had common of vicinage appendant to his house; and it was S.C. resolved, that the evidence did not maintain the issue; for although both begin by prescription, yet common of vicinage does not begin by a bare prescription, but a prescription on consideration that the other shall have common in like manner in his soil. L. E. 235. pl. 37. cites 13 H. 7. 13.

2. In a replication in the avowry, prescribes to have common appurtenant, but doth not shew and aver that the cattle were levant and couchant upon the land, &c. and for that it was held to be naught by the Court. Vide 15 E. 4. 32. But in our case the issue was joined upon the prescription. And by the other fault is allowed as confessed. And is helped after verdict by the statute.

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Noy. 145. Jeffrey v. Boys, cites 5 Rep. 43. a. 3. In the case of a common you must prove the use and the appendancy. Per Richardson Ch. J. Litt. R. 295. Trin. 5 Car.

C. B. 4. A traverse being joined upon title of common, it was admitted that a release of all right of common in that place should be given in evidence, and needed not to be pleaded as he might have done; on the other part it was shewed the common did belong to land, which was entailed, which cannot pass by release, no more than the land itself, &c. can, and for that cause the issue in tail,

who was plaintiff, here did recover. Clayt. 9. pl. 16. Mich. 8 Car. before Damport Ch. B. Judge of Assis. Atkinson's Case.

5. A replevin was brought for 300 head of cattle, viz. fo many oxen, fo many steers, &c. the defendant makes conusance as bailiff to J. S. and justifies for damage-feafant. The plaintiff replies, that I. D. and all whose, &c. he had in such a messuage, and 40 acres of land, time out of mind, have had common, &c, and shews he had a lease from J. D. and so put in the cattle to use his common; to which the defendant rejoins, and justifies ut fupra, absque hoe, that they were the cattle of the plaintiff levant and couchant upon, &c. Not only the levancy and couchancy is the measure of this common, but the property of the party likewife; for if they be levant and couchant, and yet be a firanger's cattle agisted into the 40 acres, if they be the party's cattle levant and couchant upon fome other land, and not upon the 40 acres; in either of these cases they ought not to use the common, for a man cannot use his common with the cattle of a stranger, or with his own cattle levant and couchant upon any other land than that in which he hath common appurtenant; it is true, if a man borrows cattle to compeffer his land, they may be put upon the common for that he hath a special property in them, and so are said his cattle, and for this was cited F. N. B. 180. and Roll. Common 402. and of this opinion was the Court; wherefore judgment was given for the defendant. Skin. 137. Mich. 35 Car. 2. B. R. Molliton v. Trevilian.

6. The defendant prescribed for common for all cattle, &c. at all times of the year, but upon evidence it appeared that they had time out of mind common of pasture in the said common for all the cattle levant and couchant, &c. at all times in the year (sheep only excepted for a certain time ). Refolved per Cur. that they had failed in the prescription, and that the evidence would not maintain the plea; and that the prescription should have been specially pleaded with this exception. Carth. 241. Pafch. 4 W. & M. in

B. R. The King v. the Inhabitants of Hermitage.

4 Mod. 418, 7. Error of a judgment in C. B. in an action fur case, where the plaintiff declared he was lawfully possessed of a tenement, and that he ought to have common of pasture in 1000 acres, in a place called, &c. for all commonable beafts levant and couchant on the tenement aforefaid; that the defendant made cony-burrows, whereby the plaintiff could not enjoy his common in tam amplo & beneficiali modo. Defendant demurred; this matter is not traversable, for all right of the common must be given in evidence upon not guilty, or else plaintiff cannot recover; and if fo, it is to no purpose to set it forth in the declaration, 12 Mod, 98. Trin. 8 W. 3. Birt v. Strode.

## [T. b. 19] Common Recovery.

1. Tenant for life suffers a common recovery. The remainder-man brings his ejectment. The plaintiff gave in evidence a copy of the recovery, but no evidence that there was a real te-

212 ]

424. Strode v. Birt, S. C. and S. P. and judgment affirmed .-Comb. 370. Burk v. Strode, S. C. and heid accordingly, and judgment affirmed .-

nant to the præcipe. Mr. Baron Price allowed it: for though the tenant to the pracipe must be proved against a stranger, yet there is not that occasion for it when it is made against the party himself that fuffers the recovery. So a person claiming by virtue of a recovery must shew that there was a tenant to the præcipe, because that is in his privity, but here it is otherwise, for it is not in the privity of the remainder-man; he had not the deeds by which the tenant to the præcipe was made, and if this (which is all that the remainder-man in the nature of the thing can do) be not allowed, it is but for the tenant for life when he makes a tenant to the præcipe by deed, and the remainder can never take any advantage of it. Coram Baron Price, Winchester Summer Assises, 5 Geo.

2. In every common recovery, it shall be prefumed there was a good tenant to the pracipe till the contrary be made appear of the other part, and rather than it shall be void, the Court will intend, that the tenant was in by disseifin. 2 Lutw. 1549. cites Cro. J. 454, \* 435. the Case of Lady Griffin v. Stanhope; and said that fo it was ruled by Powel J. of B. R. in a trial at the Assises at York.

be intended that there was a good tenant in

the pracipe, and if it were otherwise the proof ought to be made by the other party. Cro. J. 445. in pl. 13. Mich. 15 Jac. B. R. in Case of Griffin v. Stanhope.

## [T. b. 20] Confent.

1. It was given in evidence to prove the affent to the rayisher that she married him, and agreed, and affented in the fanctuary of Westminster, though in going to the fanctuary she was perfuaded to difaffent, for loss of her inheritance, and she faid that she would And that afterwards the was brought into the Starchamber before the counsel, and there it was demanded if the agreed or not, who faid that he was her baron, wherefore the would not relinquish him. And it was faid for the defendant, that the espousals and all the affents were by duress force and fear of the ravisher, and it cannot be faid affent, unless she be at liberty freely without fear or durefs, which feem to be law there, but because when she was before the counsel she might have difagreed, and did not, but affented, therefore it was held free affent, by which the affife found for the plaintiff, and the plaintiff recovered per Cur. Quod nota. Br. Ent. Cong. pl. 94. cites 5 E. 4. 58.

2. It is not conclusive evidence to prove the avoman's confent to the ravisher, to shew, that she lived some years with him as his wife, and had a child by him, if all the time she was [ 213 ] under his power, and never at liberty. 2 Hawk. Pl. C. chap. 23. fect. 58.

2 Freem. Rep. 132.

pl. 159. S. C.

#### [T.b. 21] Contempt.

1. One witness sufficient to prove a contempt. Toth. 103. cites

Mich. or Hill. 13 Car. Sands v. Knighton.

2. Per Cur. on affidavit of the lie given by any man to another in the Hall, they will bind him to his good behaviour; fo for any provocations that may induce any quarrels or striking. 1 Keb. 558. pl. 77. Trin. 15 Car. 2. B. R. Collins v. Man.

3. A plaintiff is a good witness to prove a contempt, and plaintiff's oath is sufficient to convict the defendant, unless the defendant in his examination swear clear contrary; per Ld. Kerp. Bridgman. 3 Chanc. Rep. 39. Mich. 1669. Nurse v. Guillim.

4. One may be committed for a contempt done to the Court; but the matter of the contempt must be certain and not doubtful, and must be either in open Court or upon affidavit made thereof. (Mich. 22 Car. B. R.) For else the party may perchance be wrongfully committed, which the Court will be cautious not to do. L. P. R. 305.

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5. Where a man is arrested upon an attachment the contempt shall hold good, though no affidavit be filed at the time of taking forth the attachment if it be filed before the return of it. Vern.

172. pl. 166. Trin. 35 Car. 2. Anon.

6. Defendant was reported to have fully answered some of the interrogatories, and to be in contempt as to others; and being brought into Court to receive judgment, the question was, whether all the assiduants in a Cause of Lane v. Jones, containing the whole charge against defendant, ought to be now read, or only such of them as relate to that part of the charge, which defendant, on his examination, has fully answered. The three prothonotaries reported, that defendant being in contempt, his examination goes for nothing, and assiduants containing the whole charge were read. Barnes's Notes in C. B. 190, 191. Hill. 12 G. 2. The King v. Willis.

## [T. b. 22] Contents of Deeds.

1. The fubstance of a deed cannot be proved but by the deed itself, unless it is burnt, or in the possession of the plaintiff bimself; and if so, then this matter as it happens must be sworn, and that the deed was executed; per Holt Ch. J. 3 Salk. 154. pl. 6. Hill. 8 Will. 3. B. R. Lynch v. Clerk.

2. In an information for a riot upon the person of Sir F. W. a letter of the prosecutor's was admitted to be read for defendants; but then they produced a witness to swear the contents of another letter which he deposed was the same hand of the letter produced, but owned he never saw Sir F. W. write, and was therefore disallowed. Skin. 673. pl. 12. Mich. 8 W. 3. B. R. The King v. Sir Thomas Culpepper.

In a fuit be3. If a deed be lost by an inevitable accident, it may be proved tween A. by a copy, but not by parol evidence, though there should be no copy.

copy. Yet it was held, that parol-evidence should be allowed to produced a shew the contents of a deed that was not lost, but was proved to be fuit afterin the possession of the other party; for here if the defendant was wards bewronged by the parol evidence, it was in his power to fet all tween C. right by producing the deed. 10 Mod. 8. Pafch. 9 Ann. B. R. and A. it was viva Sir Edward Seymour's Cafe.

that A. in

a cause between A. and B. produced such a deed which proved so and so, &c. Per Cur. it is good evidence, for here A. may give that very deed in evidence if he will, which C. cannot, because it is in A.'s custody. Carth. 80. Mich. I W. & M. Eccleston v. Speke.

## [T. b. 23] Conviction.

[ 214 ]

1. Copy of a conviction before commissioners of excise is good evidence, without producing the original book of entry; and it need not be proved that the commissioners did give the judgment recited in the copy of the conviction. Carth. 346. Pasch. 7 W. 3. B. R. Fuller v. Fotch & al.

## [T. b. 24] Copyhold.

1. Stewards books, Court-rolls, or bailiffs accounts, are good evidence in themselves. Hetl. 46. Mich. 13 Car. C. B. Fawkner v. Billingham.

2. Proclamations whereby the lord claims forfeiture of a copyhold, ought to be proved viva voce, and not by the Court-rolls only; held in evidence to a jury. Keb. 287. pl. 98. Pasch. 14 Car. 2. B. R. Pateson v. Danges. Alias, Ld. Alisbury's Case.

3. It shall be prefumed that an entail is cut off some way or other, when many admittances fince have been in fee-simple. Scrogs 69.

4. The dispute was between the lord of the manor and the devifee of a copyhold of the same manor; and it was ruled by Holt Ch. J. Lent affifes 1693, at Cambridge, That the recital of the will in the copy of the admittance was good evidence of the devife against the lord or any other stranger; but if the fuit had been between the heir of the copyholder and the devisee, the will itself ought to have been produced.

2. He ruled, That the foul draught of the lord of the manor of the admittance was good evidence. Ex relatione magistri Place. Ld. Raym. Rep. 735. Anon.

5. A paper-book was produced of the acts of the Court in which the Ibid. per admissions and surrenders of the copyhold estates were entered; but Baron Car-Baron Carter at Thetford assises held it no evidence. He faid, at Bury Af-That the roll ought to have been upon parchment, and in strictness fifes, in the Should have been in the form of rolls made up in the Courts above; but Cafe of that if the prefent admission had been entred in a parchment Roper. book, he should have allowed it for evidence. He said, he did agree that in a late case the Ld. Ch. Baron and two other Barons were of opinion that fuch paper-book was good evidence, but at that time he declared his opinion to the contrary, and of this

opinion he still continued. 2 Barnard. Rep. in B: R. 405, 406, Hill. 7 Geo. 2. at Thetford Assists. Chance v. Dod.

6. But upon producing a copy of this admission, the baron allowed it as evidence, and said it has often been so: 2 Barnard. 406.

Hill. 7 Geo. 2. Chance v. Dod.

7. A paper-writing signed by the lord of the manor testifying such surrender made by the lord himself of copy-lands to the use of the surrenderor's will, and the plaintiff's attorney's oath that it was signed by hand-writing of the lord himself, was allowed good evidence, though the lord himself was not present in Court to prove it. Per Baron Carter at Thetsord Assiss. 2 Barnard. Rep. in B. R. 406. Hill. 7 Geo. 2. Chance v. Dod.

8. Where a furrender is in the hands of the lord himself it is not necessary that it should be presented at the next Court. Per Baron Carter at Thetford Assiss. 2 Barnard. Rep. 406. Hill. 7 Geo. 2.

Chance v. Dod.

9. It was infifted, that no evidence could be given to prove lands to be copyhold but the rolls themselves, but Baron Carter was of a different opinion. 2 Barnard. Rep. in B. R. Hill. 7 Geo. 2. at Bury assists in the Case of Street v. Roper.

## [T. b. 25] Custom of a Manor.

1. To prove customary descents the Court enforced the parties which maintained the custom to shew precedents in the Court-rolls to prove the usage; and Coke Ch. J. said, without such proofs that it had been put in use, though it had been deemed and reputed to have been a true custom, yet the Court could not give credit to the proof by witnesses. 4 Le. 242. pl. 395. Pasch.

8 Jac. C. B. Ratcliff v. Chaplin.

2. To prove that the custom of the manor of S. was descendible to the eldest daughter, it was thewn that it was parcel of the manor of Odiam which was antient demesne, in which manor such custom is. But on the other part it was shewn, that it cannot be parcel of the manor of Od. because it appears by diverse records that this manor of S. was held of the K. by grand ferjeanty; and though it was agreed there was fuch custom in the manor of Odi yet as the manor of S. holds by fuch fervice it cannot be parcel of the manor of Od. But it was answered that this tenure in grand-ferjeanty was created by K. E. 2. and if fuch antient custom was, it cannot be destroyed nor altered by alteration of the tenure, and this was agreed by all the justices. Wherefore because diverse precedents were shewn, that lands of the freeholders used to descend there to the eldest daughter, and that lands in S. used to be recovered in a writ of right close in the Court there it was left to the jury to enquire if there was any fuch custom; but the jury could not agree, so a juror was drawn by consent and a new trial prayed, &c. Cro. C. 484. pl. 8. Mich. 18 Car. B. R. Moulin v. Dalison.

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3. It appeared by an antient book of survey that by the custom of the manor of which the estate was held the copyholds there should not only go to the youngest son, but also in case the youngest fon died without issue, it should go to his youngest brother, and not to the eldest, and if no sons then it should go to the youngest daughter, &c. The question being, whether upon the death of the youngest son it should go to his next youngest brother, or to the eldest; the Chancellor directed an iffue for trial of the custom. Vern. 489. Mich. 1687. Edwin v. Thomas.

4. A custom of a manor should be proved out of the books or furveys of the manor, and not by parol; which is bad evidence. Coram Baron Cummins at Taunton Affifes. Hill. Vac. 1727-8:

#### [T. b. 26] Custom of Merchants.

1. The custom of merchants ought to be proved by those that have had frequent experience, and have known cases so ruled; Skin. 54. pl. 7. Trin. 34 Car. 2. B. R.

## [T. b. 27] Evidence relating to Deeds.

1. On non est factum it was found that the defendant submitted and fealed the bond, and cast it upon a table, and the plaintiff took it without any other delivery, or any other thing amounting to a delivery. Held that this is no delivery. Le. 140. pl. 193. Hill. 30 Eliz. C. B. Chamberlain v. Staunton.

2. And this is not like the cafe lately adjudged here that the obligor subscribed and sealed the obligation, and cast it upon a table, faying, This will ferve, which was held a good delivery, the [ 216 ] speaking the words being a circumstance by which the will of the

obligor appeareth that it shall be his deed. Ibid.

3. A witness proved the delivery of a deed, but could not say it was on the day of the date; Coke Ch. J. directed the jury to find it according to the date fince it was proved to be delivered, and it shall be intended to be on the day of the date. Roll. R. 3 Pasch. 12 Jac. B. R. Stone v. Grubham.

4. The contents and sufficiencies of deeds are not to be proved by testimony of witnesses, the construction of deeds being the office of the Court. 3 Ch. Rep. 92. 16 June, 17 Car. 1. Earl of Suf-

folk v. Greenvill.

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5. Plaintiffs were the defendants fifter's children, and on a bill against defendant (being an infant) to discover a deed, the question was, if the defendant's father had settled lands on plaintiff's mother; the proof was, that about two years before her marriage he had put her in possession of these lands, and had articled on her faid marriage to fettle them on her and her heirs, and the defendant (then an infant) was a witness to the articles. But though there was no other proof of fuch deed of fettlement, yet the Court decreed for the plaintiff, but it was conceived a hard Vol. XII.

case to decree an equity on a deed which had no other proof.

N. Ch. R. 94. Kingston v. Manwaring.

Skin. 2. pl. 2. S. C. and S. P. accordingly.

6. Where there is a common feal put to a deed of corporation that is title enough without a witnefs to prove it, or that the major part, of the College be agreed, and if it be faid, that it was put to by the hand of a stranger that shall be proved on the side that says so, Sic dictum suit. Skin. 2. Mich. 33 Car. 2. B. R. in the Case of Ld. Brounker v. Sir Robert Atkins.

7. Indenture inrolled of bargain and fale is good evidence, though it is not proved to be executed by the bargainor. Cumb. 247.

Pasch. 6 W. & M. in B. R. Smart v. Williams.

8. A deed to lead the uses of a fine fur concessit need not be

proved per testes. Try. per P. 209.

9. To prove the fealing and delivery of a deed, and not know the party that did it, is not good evidence; but if he knows the party upon fight of him it is good enough. Try. per Pais, 172.

10. Upon a bare recital in a deed of a deed of uses on a fine, proof must be made that there was such a deed. 6 Mod. 45.

Mich. 2 Ann. B. R. Ford v. Ld. Grey.

11. A copy of a deed leading the uses of a fine, and enrolled for safe custody only, was allowed to be read as evidence at a trial at law. 2-Vern. 471. pl. 429. Mich. 1704. Combes v. Spencer.

12. Leases made in breach of articles not suffered to be read as

evidence. Jan. 20, 1702. Ld. Peterborough v. Germain.

13. Attested abstract of a deed no evidence. Jan. 20, 1702.

Ld. Peterborough v. Germain.

14. A mortgage deed was produced in Court, dated 11 April 1710, and some of the officers of the stamp-office attending affirmed that by the stamp on that deed it could not be made in the year 1710, but in the year 1711 or after; because that stamp was not used before the year 1711, so that there was a strong presumption it was antedated on purpose to over-reach the settlement on the plaintist, whereupon the Ld. Chancellor ordered a trial at law. 9 Mod. 97. p. 10. Geo. 1. Osborn v. Lea.

## [ 217 ]

## [T. b. 28] Demand of Rent.

1. Where a demand is made of rent in order to avoid a leafe, it must be made of the last half year only. Coram Prat Ch. J. apud Croydon Assiss in Autumn, 1720.

## [T. b. 29] Denizen.

1. Denizen or not cannot be fufficiently proved but by matter of record; per Williams J. 2 Bulf. 34. Mich. 10 Jac. Olave School's Case in Southwark.

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## [T. b. 30] Descent.

1. Dugdale's Baronage not allowed in evidence to prove a de-2 Jones 164. Mich. 33 Car. 2. B. R. Piercy v. —

2. Chart of pedigree, no evidence of itself without thewing the books and record whence deduced to prove descent. 2 Jones 224. Mich. 34 Car. 2. B. R. Earl Thanet's Cafe.

## [T. b 31] Devastavit.

1. In debt against executors suggesting a devastavit, an actual devastavit must be proved as well of money as of other chattels; for now the party is chargeable in his own right. 2 Keb. 676. pl. 55. Trin. 22 Car. 2. B. R. Kettle v. Stellye.

## [T. b. 32] Devise of Land.

1. Held in case of a devise of land, that the shewing the will under feal and proof that it was examined by the original is good evidence without shewing the original. Clayt. 57. pl. 98. July 1638, before Barkley Judge of Affife, Lodge's Cafe.

2. The point in issue was, if J. S. devised lands to J. N. and his heirs or not; the finding a devise to B. for years remainder to 7. N. and his heirs is not a finding according to the issue, for the issue is upon an immediate devise in possession. Jo. 224. pl. 5. Pasch. 6 Car. the King v. Newdigate.

3. Copy of a will examined at the Prerogative Office is not evidence to make title to lands by devise. Cumb. 248. Pasch. 6 W. & M. in B. R. Smart v. Williams.

4. A will under which a title is made for the plaintiff must be shewn to the Court itself, and not only a copy of it, which they refuse to admit. Keb. 117. pl. 23. Mich. 13 Car. 2. B. R. Eden v. Chalkhill.

## [T. b. 33] Disfranchisement.

1. A disfranchifing of a free burgess of Newcastle by an and of common council was allowed without producing the charter; per Tracey J. York Aff. 1714.

## [T. b. 34] Earnest Money paid. The Effect thereof.

1. Earnest money paid on an agreement for goods binds the bargain, but the money must be paid on fetching away the goods, because no other time of payment is appointed. The earnest only binds the bargain, and gives the party a right to demand; but then a demand without payment of the money is void. After earnest [ 218 ] given, the vendor cannot fell the goods to another without a de-

fault in the vendee, and therefore if the vendee does not come and demand the goods, the vendor ought to go and request him, and then if he does not come and pay, and take away the goods in convenient time, the agreement is dissolved, and he is at liberty to fell them to any other person. I Salk. 113. pl. 2. Pasch. 3 Ann. Coram Holt Ch. J. at Guildhall. Langfort v. Tyler.

#### [T. b. 35] Ejectment.

1. If a leffee brings an ejectment and has a verdict, and afterwards the reversioner brings an ejectment likewise, the reversioner shall have advantage of the verdict and give it in evidence; per Cur. Hardr. 472, Hill. 19 & 20 Car. 2. in Scacc. in Case of Rushworth v. Pembroke (Countess) and Currier.

## [T. b. 36] Election of Parliament Men.

1. A. was duly chosen parliament man, but B. was returned, and upon a petition to the House of Commons, A. was voted well chosen, and the return amended. In case brought by A. for a false return; it was adjudged, that as this case was it did not lie, because it appeared upon record, that he was returned. But if instead of an action on the case he had brought an action on the statute, it would have been well; for there the clerk's notes would have been evidence. Holt's Rep. 629. 635. Mich. 5 Ann. Kendall v. John.

## [T. b. 37] Endowment.

1. Though there can be no proof of an endowment, but because of long possession and being presentative, decreed to be enjoyned. 9 Car. A Case between Grimes and Smith in the Exchequer-chamber. Toth. 270. cites Neale v. Lister, about 39 Eliz.

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2. A deed found in the archives of the chapter was admitted to prove an endowment of the vicar, being but concurrent evidence, though it appeared not to have been ever fealed and delivered. 2 Keb. 126. pl. 79. Mich. 18 Car. 2. B. R. in Cafe of Smith v. Rawlins.

3. Payment is evidence of the endowment of a vicarage, and no man can prove other endowment, and a confultation was denied. 2 Keb. 729. pl. 13. Hill. 22 & 23 Car. 2. B. R. Brigham v. Robson.

## [T. b 38] Entail.

1. If there was a gift in tail, reversion in the crown before the statute de donis, and the possession hath been time whereof, &c. in purchasors, if the possession cannot be proved to be in the King after the statute of W. 2. it shall be intended to be made post prolem suscitatam,

suscitatam, and before the statute de donis. Cro. J. 454. 1. 31.

Mich. 15 Jac. B. R. Griffin v. Stanhope.

2. An old inquifition finding an entail created about two hundred years fince was fet up to defeat a purchase; Ld. C. Parker said, that if there was not the clearest proof imaginable of such an entail, the jury was in the right not to find it. Wms's Rep. 671. 673. Mich. 1720. Leighton v. Leighton.

3. A deed of entail in King James the First's time was proved by an inquisition post mortem finding it in hac verba. 2 Ld. Raym. Rep. 1292. Mich. 8 Ann. B. R. Burridgev. the Earl

#### [T. b. 39] Entry and Suspension.

[ 219 ]

1. In ejectione firmæ in evidence to the jury, where three Palm. 401. feveral parcels of land lay in one county, and the Lady Argol thought the having right (as she thought) to let them all to the plaintiffs who entry of the brought the action, and the lands were in the hands of three fe- attorney to veral lesses of Cheyny. She made a lease by deed, and deli-vered it as an escrow to J. S. and made likewise a letter of attor-deridge and ney to J. S. to enter in her name upon all the lands, and to de- Crew J. J. liver unto her lessees the deed as her deed. Witness proved, that because in the entered upon one leffee in the name of all the land; and one county, Jones J. thought it well done, because if the freehold be in one, though there be feveral leffecs for years, entry in one acre in the name of all is good enough; yet Bridgman held there ought to be proof of the entry of the leffces into all acres. At last it was fully proved, that the entry of the attorney and the leffees was into all. Lat. 71. Pafch. 1 Car. Argol v. Cheyny.

2. In evidence to the jury on a writ of entry fur diffeifin, the demand was for a manor, and non diffeisivit pleaded for tenant, demandant gave in evidence, that the tenant had entered into the demesnes of the manor, and put him out; counsel for the tenant put the demandant to prove, that it was a manor, and that the tenant had received the atornment of the tenants, because a manor cannot fubfift without tenants, and the demandant failing to prove this was, nonfuited. Arg. Lat. 62. Pafch. I Car. cites

Delabar v. Hudson.

3. In evidence to a jury, it was offered as evidence of an entry a note thereof subscribed by the person that entered, and the witnesses thereto were dead, and their hands only proved, and that it was done by direction of Hyde J. of the C. B. who testified it, which after some doubt the Court would not admit, without proving actual entry, especially being to avoid a fine; but they admitted what Hyde faid, as a good inducement to the jury, but no convincing 1 Keb. 502. pl. 62. Pasch. 15 Car. 2 Fryer v. evidence. Combes.

4. At a trial at nisi prius in Middlesex, a fine and five years being given in evidence upon ejectment in bar of the title of the leffor of the plaintiff, the plaintiff shewed, that at the time of the fine levied he was an infant, and that within three years he came to the

lands in question, and at the gate of the house faid to the tenant that he was beir of the bouse and land which he held, and forbad him to pay more rent to the defendant; upon which it was demanded, if he entered into the house when he made the demand; and it was faid that no; upon which it was faid that the claim at the gate was not fusicient, the which was agreed; but then it was proved, that he entered the house when he made claim, the which being eo instante it was well enough; per Holt Ch, J. though the claim was but at the gate, but after it appearing that there was a court before the house, so that though the claim was at the gate, yet it was upon the land, and not in the street, and therefore it was ruled to be good without question. Skin. 412. pl. 8. Hill. 5 W. & M. in B. R. Anon.

T Salk. 285. that it mut

s. In proving entry and claim it is necessary, first to prove the Plane S. C. claim to be upon the land claimed ( without special cause ) Secondly, be upon the that it be animo clamandi. 6 Mod. 44. Mich. 2 Ann. B. R. Ford v. Ld. Grey.

6. A deed of title to leffor of the plaintiff of a vill except Blackacre, the statute of limitations being pleaded, and an entry and claim being offered in evidence to avoid it, they were put to prove the [ 220 ] entry to have been in another place than was excepted. 6 Mod. 45.

Mich. 2 Ann. B. R. Ford v. Ld. Grey.

6. On plea of entry and suspension, there must be an actual If an entry only (though oufler and refufing to let the party occupy. Coram Baron Cummins at Taunton Affizes, Hill. Vac. 1727-8. never fo

fmall and leffee re-entered, yet the rent is sufpended, for part of profit is taken from the leffee. 1 R. Ab. 940. Leffor enters lawfully as by furrender, forfeiture, &c. into part, the rent is extinct as to part. Co. Lim. 1 & b. - Ejectment and disturbance of common and inclosure against commoner is not sufpension. 2 Roll. Rep. 415. Mich. 21 Jac. B. R. Sanderson v. Harrison.—Cro. J. 679. pl. 16. S. C. adjudged.——

## [T. b. 40] Estate at Will.

1. No estate at will can be without entry, for that is oppositum in objecto. His entry proves his intent to hold at will. Arg. Mar. 70. Mich. 15 Car. in Cafe of Leake v. Dawes.

## [T. b. 41] False Imprisonment.

1. Every restraint of liberty implies a taking in law; as if A. comes into B.'s house to eat and drink, &c. A. detains B. in his house, an action of false imprisonment lies. 3 Bulf. 98. Mich.

13 Jac. in Case of Withers v. Henley.

2. If an arrest be by process out of an inferior Court in a cause not arising within their jurisdiction, the party arrested may have action against the plaintiff, who shall be intended conusant where the cause of action arose, but not against the judge or officer who has entered the plaint, or the officer who has executed it. But the proper and just remedy is against the plaintiff. 214. Trin. 34 Car. 2. B. R. Olliet v. Beffey.

3. A. has a chamber adjoining to the chamber of B. and has a

door

door that opens into it, by which there is a paffage to go out; and A. bas another door, which C. Aops fo that A. cannot go out by that. This is no imprisonment of A. by C. becauf: A. may go out by the door in the chamber of B. though he be a trespasser by doing it. But A. may have a special action upon his case against C. Ruled by Holt Ch. J. in evidence at a trial at the Summer Affizes at Lincoln 1690 in an action of false imprisonment. And the plaintiff was nonfuit. Ld. Raym. Rep. 739. Wright v. Wilson.

4. The Ld. Ch. J. of B. R. in the late King's reign figned a quarrant for apprehending the plaintiff, and the defendant being a constable arrested him on the same after the late King's demise, and thereupon the justices of sessions granted a warrant for his commitment. Evre Ch. J. held that the warrant of the Ld. Ch. J. became void by his late majesty's demise, so that the imprisonment having been upon a void process, an action of false imprisonment now brought by the plaintiff well lies. Gibb. 80. Trin. 2 & 3 Geo. 2. at Nisi Prius in Middlesex. Anon.

## [T. b. 42] False Return.

r. On an information for a falfe return to a mandamus, there needs no other evidence to prove the return to be the mayor's but the copy of the writ and return in the Crown Office; that though upon a consultation the majority be against him, and make a return in his name, yet it shall be taken to be his if he does not come and disavow it. That this is not necessary to prove a delivery of the writ to [ 221 the mayor, no more than to a sheriff in a false return against him. 6 Mod. 152. Pafch. 3 Ann. B. R. The Queen v. Chapman.

## [T. b. 43] Fee Farm Rents.

1. Old rent rolls admitted to be evidence to prove fee farm rents, for being very antient it cannot be supposed they were made with a view to serve the present purpose. MSS. Tab. 12. April 2, 1729. Newburgh v. Newburgh.

## [T. b. 44] Fees.

I' No Court has a power of fettling the fees of its officers, fo as to conclude the subject, but thus far they may go, as to judge what are reasonable fees, and in a quantum meruit by the officer for fuch fees, the judges affelling them reasonable may be good, but not conclusive evidence to a jury; and so of the table of usual fees of a Court not newly erected; and after it is once found reasonable by a jury, then it may become conclusive evidence, and so it has been adjudged, 15 Car. 2. between Beal and Prior for the fees of the register of the office of infurance. Per Holt Ch. J. 12 Mod. 609. Hill. 13 W. 3. B. R. in Cafe of Ballard v. Gerrard, -cites Hard,

[ 222 ]

#### [T. b. 45] Fines levied.

1. If a fine be pleaded in the fame Court, there it suffices to be exemplified in the fame Court; but if a man pleads it in another Court he ought to shew it exemplified under the Great Seal of England in Chancery, if he will plead it, but he may give in evidence the feal of C. B. Br. Monstrans, pl. 68. cites 24 E. 3. 46.

2. In a general issue the justices may find of themselves a fine if they know of it, though not shewn by any of the parties; and if it be true that there is such a fine, they may find it by credit of any that have seen it; and the part indented shewn forth is usual testimony of the truth of such fine. Pl. C. 410. b. Mich. 13 & 14 Eliz. in Case of Newys and Scholastica v. Clarke.

3. Whatever the jury may take cognizance of themselves may be given in evidence by words or copies, or other arguments of truth; as of fines or recoveries. But in pleading a man cannot make to him title in any case by record without shewing it under the Great Seal; or as Weston J. says, must bring it under the Great Seal by a day affixed; but such day shall not be given where it is given in evidence, and the sinding it by the jury is sufficient; and they may find it of themselves, though it be not shewn to the jury in evidence, and so may do it on circumstances inducing verity. Pl. C. 411. Mich. 13 & 14 Eliz. in Case of Newys and Scholastica v. Clarke.

4. A fine with proclamations, when given in evidence, ought to have the proclamation indorfed on it, and it is not enough to fay that it is fecundum formam statuti. Held in a trial per Scroggs Ch. J. 2 Show. 126. pl. 105. Trin. 32 Car. 2. B. R. Anon.

5. If a fine be given in evidence with five years non claim, &c. the fine must be shewed with the proclamations under feal, and the chirograph will not serve. Try. per Pais, 209.

6. Counterpart of a deed without other circumstances is not sufficient, unless in case of a fine, in which case a counterpart is good evidence of itself. 1 Salk. 287. pl. 23. Mich. 3 Ann. B. R. 6 Mod. 225. Anon.

7. The caption and covenant are never given in evidence to prove a fine, they not being of the essence of the sine; per Cur. 10 Mod. 45. Mich. 10 Ann. in Ld. Say and Seal's Case.

## [T. b. 46] Right of Fishery.

1. In case of a private river the lord's having the soil is good evidence to prove that he has the right of fishing, and it puts the proof upon them that claim liberam piscariam. But in case of a river that slows and reslows, and is an arm of the sea, there prima facie it is common to all; and if any will appropriate a privilege to himself, the proof lies on his side; per Hale Mod. 105. pl. 14. Hill. 25 & 26 Car. 2. B. R. Anon.

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## [T. b. 47] Fraudulent Conveyance, or Sale.

1. Action on the case for fraudulent sale of horse to the plaintiff, as the proper horse of the defendant, ubi revera it was the horse of J. S. because the plaintiff could not prove that the defendant knew it not to be his own horse, (for the declaration must be, that he did it fraudulently, and knowing it not to be his own horse) the defendant having bought the horse in Smithsield, but not legally tolled; the plaintiff was nonsuited. Allen 91. Mich. 24 Car. 2.

B. R. Sprigwell v. Allen.

2. In ejectment plaintiff declared, that A. was feifed in fee of a manor, and in 1647, for the confideration of 5000 l. paid to him, made a feoffment to J.S. and J.N. and their heirs in trust for B. Defendant made a title under the marriage-fettlement of A. who in 17 Jac. married E. M. and then fettled the faid manor upon himself for life, and on his issue in tail, and that the defendant was heir in tail. But on the other fide it was infifted, that this fettlement was fraudulent against the purchaser, and that it could not be thought otherwise, because both the original and counterpart was found in A.'s study after his death. An objection was made to the fettlement itself, which recited, that whereas a marriage was intended between the faid A. and M. now in confideration thereof, and of a portion, he conveyed the faid manor to the feoffees, to the ufe of himself for life, but doth not say, from and after the solemnization of the marriage; fo that if the had not married A. yet after his decease she would have enjoyed the estate for life. Upon the whole matter the jury found for the defendant. 3 Mod. 36. Mich. 35 Car. 2. B. R.

3. Upon a question, whether a conveyance made by a bankrupt a short time before act of bankruptcy committed were fraudulent or not? these points are agreed by the Court; 1st, That a sale being to a near relation of the party's was some mark of fraud, though not a conclusive one, because relations might be real creditors, or give a valuable consideration. 2dly, The non-payment of money at the time of executing the deed is another. 3dly, It is some evidence of a bona side conveyance, that the deed mentions money paid; but that had need of other corroborating circumstances, as enjoyment,

Cc. 12 Mod. 439. Hill. 12 W. 3. B. R. Anon.

## [T. b. 48] Hand-Writing.

1. In the bishop's trial it was declared by Powel J. that in civil actions a slender proof was sufficient to make out a man's hand, as by a letter to a tradesman, or correspondent, or the like; but in criminal cases the proof ought to be positive and substantial, not by belief. This was in proving Ld. Chichester's hand, but the Court [ 223 ] was divided.

2. On a trial at bar about a will, one of the witnesses would not swear that he saw the testator seal and publish his will. Holt

Ch. J. faid, If there be three subscribing witnesses to a will, this is fufficient within the statute; for otherwise it would be in the power of a third person to defeat the will, and therefore, if proved to be his hand, and that he fet it as a witness to the will, it is sufficient to satisfy the statute. Skin. 413. pl. 9. Hill. 5 W. & M. in B. R. Dayrell v. Glascock.

3. Where there are two witnesses to a deed who are dead, if there be full evidence to prove one of their hands, and any evidence that endeavours have been used to find one to prove the other's hand, it is sushcient, for perhaps the witness might be a stranger, and it would be a hard task to prove his hand; per Cur. Cumb. 248. Pasch. 6 W. & M. in B. R. in Case of Smart v. Williams.

Comparifon of hands was held not to fon, unles the papers

4. To prove a hand-writing by fimilitude, and by those who have known the hand, though the party was not feen to write it, was be good evi- allowed sufficient proof of a treatonable writing in Sidney's Case; dence in trea- for this is faid to be as much proof as the thing is capable of, especially where the writing is found in his possession. Sid. Try. 51. are found in Yet Sidney faid, it had been declared in the Lady Carr's Cafe to the cultody be no lawful evidence in criminal causes. L. E. 279. pl. 19. of the per- Cites Sidney's Try. 32.

and not of another. Skin. 579. Crofby's Cafe .- 12 Mod. 72. S. C. And per Cur. it is not fufficient for the original foundation of an attainder, but may be well used as a circumstantial evidence, if the 12th be otherwise proved; as in my Lord Preston's Case, his attempting to go with them into France, and principally where they were found on his person; but here, fince they were found elsewhere, to convict on a fimilitude of hands, was to run into the error of Colonel Sidney's Cafe .-12 Med. 72. Pafch. 7 W. & M. King v. Crosby.

> 5. In an action of debt upon an obligation, and non eft factum pleaded, a witness was sworn who said, that his hand was subscribed as a witness, but he did not see the obligation sealed and delivered; upon which the Court demanded of him, if ever he fet his hand as a witness but where he saw the sealing and delivery; and he faid that no; and that he never faw it; upon which one was sworn to prove the hand of the other witness who was dead, the which was opposed; but Holt Ch. J. faid, that a man shall not lofe his obligation, because they have tampered with his witness, and he allowed the plaintiff to prove the obligation by comparison of hands of the other witness. Skin. 639. pl. 2. Pafch. 8 W. 3. B. R. Blurton v. Toon.

> 7. At summer affizes at Warwick 1699, a deed was produced to which there were two witnesses, one of whom was blind. It was ruled by Holt Ch. J. that fuch deed night be proved by the other witness, and read; or might be proved, without proving that this blind witness is dead, or without having him at the trial, proving only his hand. And fo it was done in this cafe. Raym. 734. Wood v. Drury.

> 8. Debt upon bond by G. as executor of C. against N. which C. happened to be the only furviving fubscribing witness, and his subscription was proved by parity of hands. Per Parker Ch. J. that G. being disabled by proving the will, is as if there was no witness in being, where parity of hands may be allowed. So in

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ease of depositions in Chancery, which were taken before any interest accrued to the deponent, and in case of a will, if an interest accrue to the witness subscribing, &c. after he had made his subscription, this may be proved by parity of hands. Hill. Vac. 37. at Guildhall Sittings, Godfry Executor of Chamberlain v. Norry.

9. Where a witness would swear to the hand-writing of ano- [224] ther, he must be able to say, that he has seen such a person write, unless where there has been any fixed correspondence by letters, and that it can be made out that the party writing such letters is the same person that attessed the deed, and then that will be sufficient. Per Raymond Ch. J. Gibb. 196. pl. 9. Hill. 4 Geo. 2. Ld. Ferrers v. Sherley.

10. If a witness to a deed is dead, it is sufficient to prove his hand without the hand of the party. Per Pratt Ch. J. Trin.

Vac. 1719.

of them said that his name was very like his hand, but he never saw the note executed, for he remembered the time, when he was called in to witness some writings between the parties there were only two half sheets, and each of them stampt, but no such paper as the note was attested by him, the other witness said the same. Upon which the plaintist produced the two half sheets, and the witnesses swore to the execution of them. Whereupon Pratt Ch. J. lest it to the jury, on the similitude of the hands between the deeds proved and the note, and the jury sound for the plaintist. N. B. One of the deeds mentioned the sum of 10 l. paid by the desendant to the plaintist, by which the jury thought was intended the note under his hand. Pasch. 6 Geo. at Nisi Prius Carbone v. Cotton.

12. Two witnesses to a bond, one in Bedlam and mad, and the other in Africa, on order to prove an exhibit viva voce in Chancery, a witness proved this fact, and their hands to the bond as

if dead. Per Ld. Chan. Trin. 5 & 6 Geo. 2. Canc.

13. If both witnesses are beyond sea proving the hand of the party is not sussicient, but in such cases it is usual to prove the hand only of one of the witnesses, and that they are beyond sea, and proving both their hands not necessary, (ut dicitur.) Trin. 5 & 6 Geo. 2. in Case of Smith v. Richards.

14. Similitude of hands no evidence, but faying that he was well acquainted with his writing, and know it to be the party's, is fo.

Per Bury Ch. B. at Francia's Trial, pa. 18.

## [T. b. 49] Heir.

1. In evidence to a jury to prove J. S. to be heir to W. S. the Court would not accept the pedigree drawn by a herald at arms for evidence, nor will suffer the jury to have it with them, but it is only information for direction. 2 Roll. Abr. 687. I. f. pl. 2-cites Pasch. 8 Jac. B. Plumpton v. Robinson. Pasch. 12 Jac. B. without any proof by office, or other substantial matter; per Curiam.

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2. An act of parliament's reciting T. S. to be heir does not make him fo; per Cur. 12 Mod. 384. Pafch. 12 W. 3. Anon.

#### [T. b. 50] His Freehold, Money, &c.

2 And. 48. 1. His freehold must be intended his own freehold, and in his pl. 36. own right, and finding that it was the freehold of the avowant's Anon. feems to be wife is not fufficient. Cro. E. 524. pl. 52. Mich. 38 & 39 Eliz. s. c. & S. B. R. Bonner v. Walker. P. held ac-

cordingly by three justices, but one doubted.

#### 225

2. In trespass the defendant pleads, that the place where is his freehold, and gives in evidence a fine with proclamations; it is good evidence, because it is a title. Brown's Anal. 16.

3. The declaration is, that the plaintiff was robbed of 10 l. de denarits ipfius querentis; and upon the evidence it appears, that the plaintiff was the receiver of the Lady Rich, and had received the faid money for the use of the lady; and exception was taken to it; but it was not allowed; for the plaintiff is accountable to the Lady Rich for the faid money. L. E. 52. pl. 5.

## [T. b. 51.] Imprisonment at the Time of the Outlawry.

1. Error to reverse outlawry for one who was in prison at the time of the outlawry under the custody of the bishop of E. in his prison, and the bishop certified that he was in his prison at the time of the outlawry, &c. and another would have averred for the King that he was at large at the time, &c. and was not permitted contrary to the certificate of the bishop; Brooke says, and so see, that the certificate of the bishop is as credible in other cases, as in case of bastardy. Br. Certificate de Evesque, pl. 23. cites 15 E. 3.

[T. b. 52] Incumbent.

1. In a fuit for tithes in the Spiritual Court, the defendant pleaded, that the plaintiff (the parson) had not read the thirty-nine articles, and the Court put the defendant to prove it though a ncgative; whereupon he moved for a prohibition which was denied; for in this case the law will presume, that a parson has read the articles, for otherwife he is to lose his benefice, and when the law presumes the affirmative then the negative is to be proved. 1 Roll. Rep. 83. pl. 29. Mich. 12 Jac. B. R. Monke v. Butler.

In ejectment of a rectory, leffor of the bis inititution and induction,

2. In case of tithes, &c. If the plaintiff be a parson, vicar, or other ecclesiastical person, and claims the tithes in right of the church, or benefice whereof he is incumbent, he is in strictness plainiff, at bound to prove his institution and induction, and all things else required ter proving by law to qualify him to be the incumbent of the church to which the tithes belong, and yet if such plaintiss hath been for several years in possession, he is not ordinarily put to prove those matters, unless

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the defendant in his defence shews some reason why the same was required ought to be proved, &c. But the law has not determined how reading and many years fuch plaintiff ought to be in possession to excuse his subscribing being put to fuch proof. But that feems to be left to the judge's the thirtydiscretion, though I conceive three or four years may fuffice. nine articles, and his L. E. 128. pl. 98.

declaring in the church

his affent and confent to all the things contained in the common prayer-book, and this ought to be done within the time limited by the statute which appoints them. Sid. 220. pl. 8. Mich. 16 Car. 2. B. R. Snow v. Philips .- And it was ruled per Cur. that in ejectment, admission, institution and induction is good title without shewing any right in the presentor; for upon the presentment of a thranger it is good matter to bar him that has right in ejectment, and put him to his qua. imp. Ibid.

#### [T. b. 53] In Custodia Mareschalli.

1. The entry of the committitur will not charge the marshall in escape, unless the party be in custody. Sid. 220. pl. 5. Mich.

16 Car. 2. B. R. Conny v. Jacob.

2. To prove a person in custody of the marshal of B. R. it is sufficient to shew a charge against him, &c. if on mean process without proving any committitur upon the roll, but if he is to be confidered as a prisoner in execution, there the committitur upon the roll must be proved. 1 Sid. 247. pl. 5. Hill. 16 & 17 Car. 2. \ 226 \ B. R. in Cafe of the King v. Povey, & al.

3. N. B. After a committitur in the office the marshal must be ferved with a rule, or there must be a committitur in the marshal's book upon a reddidit fe. I Salk. 272, 273. pl. 3. Mich. 13 W. 3.

B. R. Watfon v. Sutton.

## [T. b. 54] Inrolment.

1. Upon evidence agreed by the Court, that if the bargainer sontinue possession after involment, that he is a disseifor. For the statute transfers the frank-tenement to the bargainee. Nov.

106. Bellingham v. Alfopp.

2. In a trial at bar between Thirle and Madison it was faid by Glyn Ch. J. that if divers perfons do feal a deed, and but one of them acknowledge the deed, and the deed is thereupon enrolled, this is a good enrollment within the statute, and may be given in evidence as a deed enrolled at a trial. Sty. 462. Mich. 1655. B. R. Thurle v. Madison.

## [T. b. 55] Infimul Computaffet.

1. In an infimul computaffet the evidence shall not be on the Noy 8-. S. value of the goods, but on the account only. Latch. 169. Trin. C. accordingly, 2 Car. Wood v. Witherick.

2. Assumplit for 20% upon account, and upon the evidence it did appear to be another fum than 20 1. and it was ruled against the plaintiff, and he was nonfuit, and the judge held where an action is for 10 1. upon a contract for a horse, and the witness dotb

not prove the very fum but differs 1 d. or 12 d. in this case it shall be found against the plaintist, and cited the opinion of Walter Ch. B. to be so, but for the importunity then was contented a fpecial verdict should be found. But the Court above did rule the case against the plaintiss. Quod nota in assumpsit, where damages only are to be recovered, for in fuch cases if debt had been brought it is clear, because he doth not hit the contract, it shall be against the plaintiff. Clayt. 87. pl. 147. July 16 Car. before Folter Judge of Assise, Ramsden's Case.

3. Assumplit upon an infimul computaverunt, and non affumplit pleaded, and the plaintiff produced a writing without feal, which teffified the debt to prove his case, but it was held no good evidence, for it is another thing, and he should have declared quod indebitatus affumpfit, &c. and upon this the plaintiff was urged to be nonsuit. Clayt. 87. pl. 146. July 16 Car. before Foster Judge of Assife. Kirbie v. Emerson.

4. No infimul computaffet but on account stated.

294. Hill. 29 & 30 Car. 2. C. B. Rose v. Standen.

5. To prove an infimul computatfet it was proved that the defendant and plaintiff's wife reckoned that the defendant had borrowed at one time 40s. at another time 40 s. and at another time 41. and this came to 81. and he promifed to pay it; Sir Bar. Shower urged that this could not maintain an infimul computaffet, for that it was only a reckoning on one fide, for there was neither payment nor deduction on the other, and at that rate faying one and one was two would make an account; but Holt Ch. J. overruled him, that it was good evidence of an account, and fo they had a verdict quoad comput. pro quer' & quoad refid' pro defend'. Show. 215. Pasch. 3 W. & M. Styart v. Rowland.

## [ 227 ]

## [T. b. 56] Intestacy.

1. In debt it was agreed, that testament proved under the seal of the ordinary is no estoppel to the plaintiff in debt against administrators to fay that the debtor died intestate, and therefore it feems that this is no record to bind, as judicial acts shall bind at the common law. Br. Ordinary, pl. 4. cites 44 E. 3. 16.

2. Error was affigned, that one pleaded (cum testamento annexo qui obiit intestat') which is absurd, and repugnant; it is well (per Cur.) for though one makes a will, yet if he makes no executor he is an intestate. Cumb. 20. Pasch. 2 Jac. 2. B. R.

## [T. b. 57] Judgment.

1. Action fur case for a false return of nulla bona sur fi' fa', when there were goods fufficient; and the plaintiff declared on a judgment in communi banco, and on evidence produced a copy of a record, Mich. 8 W. wherein was writ in the margin Cook (who is one of the prothonotaries of the Common Pleas) but there was no Placit' coram, &c. at the top, for which omillion the defendant infifted that there

there was no fair copy of a record, that it did not appear who this Cook was. That the plaintiff declared of a plea held before Sir G. Treby, and it did not appear that the record produced by him was fuch a one, and of that opinion was Holt Ch. J. who tried the couse, which the plaintiff perceiving was nonfuit. 12 Mod. 127. Trin. 9 W. 3. Crawley v. Blewet and Wolf.

## [T. b. 58] Legitimo Modo acquietatus.

1. In case for a malicious indiffment of the plaintiff for barretry he set forth that he was debito modo inde exoneratus, and at the trial to prove this he produced a nolle ulterius prosequi by the Attorney General; but the Chief Justice held strongly that the evidence did not maintain the declaration, and that the non prof. was only putting the defendant sine die, and that new process might be made out upon the same indictment, and that it would be hard to allow a man that gets off by a non prof. to maintain an action for a malicious prosecution. Indeed had he pleaded not guilty, and the Attorney General had confessed it, that would have done. 6 Mod. 261. Mich. 3 Ann. B. R. Goddard v. Smith.

## [T. b. 59] Levancy and Couchancy.

1. Upon an issue whether levant and couchant, Hale Ch. J. held that the foddering of the cattle in the yard was evidence of levancy and couchancy. Per Holt Ch. J. 1 Salk. 169. pl. 2. Hill. 2 Ann. B. R. Emerton v. Selby.

## [T. b. 60] Lewdness.

1. Being catched in a house of bawdry, or a disorderly house at seasonable time is not evidence of a lewd person, per Holt Ch. J. but several affidavits being afterwards read of her lewdness, the Court committed her till she find sureties of good behaviour. 12 Mod. 566, 567. Mich. 13 W. 3. Elizabeth Caxton's Case.

## [T. b. 61] Libel.

[ 228 ]

- 1. The finding two or three copies of a libel in a person's chamber, without discoursing of it, or delivering of it out, is no publication; per Cur. 2 Keb. 502. pl. 66. Pasch. 21 Car. 2. B. R. The King v. Fitton.
- 2. Depositions before a justice of the peace, the deponent being Comb. 353. dead, is evidence only in felony, but not in information for libel St. C. and against the government. I Salk. 281. pl. 8. Hill. 7 W. 3. The S. P. King v. Paine.
- 3. If a libel be made in writing, and afterwards burnt, and one remembers the contents, and dictates to another, who writes it, the writer is maker of a libel; he that takes a copy of a libel in writing, she' he be not the author, is guilty of making a libel. Per Holt

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Ch. J. Comb. 359. Hill. 8 W. 3. B. R. in Case of the King v. Paine.

4. Indictment for composing, writing, making and collecting feveral libels, in uno quorum continetur inter alia junta tenorem & ad effection fequentem (fetting out the words); jury found verdict of not guilty as to all except scriptio & collectio. And after exception in arrest of judgment, held per Curiam, 1/1. That it is not necessary to fet forth all the libel, but if any thing qualifies that which is fet forth, it must be given in evidence. Regularly where a man speaks treason, God save the King will not excuse him. 2dly. Ad effectum singly had been naught, for the Court must judge of the words themselves, and not of the construction the profecutor puts upon them, but juxta tenorem imports the words themselves; for it is the transcript. 3dly. Writing and collecting is criminal, not but that collecting had been better out of the case. Bare copying out of a libel by one that is neither contriver or composer, is criminal. The nature of a libel confifts in putting the infamous matter into writing, not in the infamous matter; for if A. speaks such words, unless such words are put into writing, it is no libel. In all cases where a man does that act which makes a thing to be what it is, he is, and must be conflrued the doer of the thing. If A. contrives any treasonable matter, and another writes down the contrivance, the writer is as guilty as the inventor. 4thly. The bare having a libel is not a publication. If a libel be publickly known, the having a written copy of it is an evidence of a publication, but otherwise where it is not known to be published. Writing a copy of a libel is writing a libel, but whether it be fo or not, when the jury finds a man guilty of writing a libel, he must be taken to be guilty of writing the original, and a copy could not be given in evidence. The copy of a libel is a libel; for fuch a copy contains all things necessary to the constitution of a libel, i. e. the scandalous matter and the writing: and it has the fame pernicious consequence, for it perpetuates the memory of the thing, and some time or other comes to be published. Such copying is not a publication, only evidence of a publication. 5thly. Objection, Writing a copy may be a lawful act, as by the clerk that draws the indictment, or by a student who takes notice of it. But answered, that the matter, abstractly confidered, is unlawful, but if the writing was innocent, there ought to be a special finding of these particulars which distinguish and excuse it. What an officer or student does is not a libel, because it is not done ad infamiam of the party, but to bring the offender to punishment. The writer is held to be a contriver Mo. 813. 9 Co. 59. b. 6thly. When a libel appears under a man's own handwriting, and no other author is known, he is taken in the manner, and it turns the proof upon him, and if he cannot produce the compofer, it is hard to find that he is not the very man. Making is the genus, and composing and contriving is one species; writing [ 229 ] a fecond species, procuring to be written a third species. 2 Salk. 417. Hill. 10 W. 3. B. R. The King v. Bear.

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5. Printing a libel is publishing it; and if a man is not able to Towhich is give an account how he came by it, it makes him the printer, and of added, that consequence the publisher. So the delivery by a printer to S. is a publi-bookseller, cation by the printer, and the receiver is an actor in that publi- and it could cation, if he does not forthwith carry it to a magistrate; if a libel- not be suplous paper be found in a man's custody, (as upon a shelf in one's had these pahouse or shop, which was S's Case) it shall be thought he printed pers by way it, unless he can give a good account how he came by it to ex- of trade, too cufe himself. Per Parker Ch. J. Hill. Vac. 3 Geo. at Guild-foreign to fuppose any one left

them in his

flioo. And whereas another libel was found in his pocket, it could not be supposed but it was conceased there for a private fule, no one taking upon him to fell fuch things in public, and S. being informed against for publishing these libels, he was found guilty.

## [T. b. 62] Liking Goods, &c.

1. If goods be bought upon liking, the vendee must return them, otherwise his detaining or not sending them back is a sufficient evidence of a liking; fo if he declares his diflike, but after disposes of them; fo if goods be fold on liking, and before the day on which party by the agreement is to return them, he fells or disposes of all or part of them, it is a liking; and time of liking, or difliking of goods is eight days. 12 Mod. 309. Mich. 11 W. 3. Burch v. Story.

[T. b. 63] Limitations.

1. If an affumplit is made to perform a thing upon request or no- Jo. 191. tice, and more than fix years pass after the promise; yet if the notice 4 Car. B. R. or request be within fix years before the action this is good, and not re- Shutfordv. strained by the statute; the cause of action was not before notice or Percowe. request. If on an assumptit a damnification be part at one time accordingly. and part at another, here he may have an entire action after the last time, and this is out of the statute. I Jo. 329. Mich. 9 Car. the promise B. R. Pecke v. Ambler.

ten years before, yet the

cause of action is the non-payment upon request after the thing done or happening, and if the action he brought within the time of the statute after the breach, it is well enough. Cro. C. 139. pl. 14. -Godb. 437. pl. 501. S. C. adjudged accordingly.

2. On a trial at Nia Prius before Holt Ch. J. it was held by him, that the plea non affumpfit infra fex annos ante impetrat' br' is original. Repl. Aff. infra fex annos ante impetrat' br' is præd. viz. fuch a day, &c. there in evidence you need not shew the original. Show. 272 Trin. 3 W. & M. Edwards v. Thomson.

3. So in a plene administravit, where the date is mentioned upon record, there you need not shew it in evidence, though it were

only by way of, viz. Show. 272. Edwards v. Thomas.

4. On an indebitatus for 9 l. the defendant pleaded non affumpfit infra fex armos, on which issue was taken. The plaintiff proved a debt of 91. due ten years before, and an acknowledgment of the VOL. XII.

debt within fix years, and an offer to pay 5 l. for the whole; per Hale the plaintiff was nonfuited, for the acknowledgment of the debt is no more than is done by the plea, but there must be a new promise of the debt within fix years to make that action hold, and here the promise or offer to pay 5 l. gives no action for the 9 l. L. E. 175. pl. 51. cites Bass v. Smith, Suffolk Summer Affiles,

[ 230 ] 6 Mod. 309,310. Mich. 3 Ann. Dean v. Crane. S. C. the Court faid, cutor might declare of a promife made tohimfe f. Sed adjornatur, and that in Hill, term upon confer-

-T. per Pais, 187. 5. Action on the case brought by an executor upon several promises laid to have been made to the testator, the desendant pleads the statutes of limitations upon which issue was joined. It appeared upon evidence, that the testator had been dead seven years before the action was brought; but the executor gave in evidence a promise made to himself within one year, which was the point faved that the exe- at the trial; a verdict was given for the plaintiff; per tot. Cur. although the owning of the debt is a continuation of it, and takes away all prefumption of its having ever been paid, and confequently brings it out of the statutes; yet this verdict did not maintain the iffue, and was fet afide, because the promise being made to the executor, could not be made to the testator infra fex annos. 11 Mod. 37. Hill. 3 Ann. B. R. Green v. Crane.

ence with all the judges, it was held, that the evidence did not maintain the declaration. --- 1 Salk. 28. pl. 16. S. C. and per Cur. the plaintiff should have declared of the promise to himself .-

> 6. W. possessed of a term for a thousand years assigned it to P. for collateral fecurity against a bond in which P. was bound jointly with W. for the debt of W. in 1655. P. died, leaving R. his for his executor. W. died leaving C. his wife his executrix, and D. his daughter his heir. In 1674, R. executor of P. and the executrix of W. and D. the heiress of W. affigned this term of 1000 years to 7. H. with condition that upon payment of 200 l. the consideration of the faid affignment by C. the executrix, &c. C. received the profits till 1691, and paid the interest to the same time; and per Holt Ch. J. it was ruled at Maidstone Lent assises, 13 W. 3. in an ejectment brought by the executor of J. H. 1stly, That he was not barred by the statute of limitations, because the statute did not prejudice at the time of the affignment, there being but nineteen years elapsed, and then the joining of him in the affignment who had the title to take advantage of the statute, gives a new title; adly, per Holt Ch. J. if a man makes a mortgage for collateral fecurity, although the mortgage is not in possession for twenty years and more; yet if the interest be paid upon the bond according to the agreement of the parties, it shall not be barred by the statute of limitations. Ld. Raym. Rep. 740. Hatcher v. Fineux.

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7. A debtor who publishes an advertisement in a news-paper, that all debts due from him should be paid, this will revive debts barred by the statute of limitations, fo as that they shall be paid. Chan. Prec. 385. pl. 265. Pasch. 1714. in the Case of Andrews v. Brown.

8. So one who by will directs that his debts shall be paid, or makes any provision for the payment of his debts in general, thereby revives a debt

a debt barred by the statute of limitations. Chan. Prec. 386.

Pasch. 1714. in Case of Andrews v. Brown.

9. So an acknowledgment and a promise to pay a debt which is barred by the statute of limitations, is sufficient to maintain an afsumplit for recovery of it; but a bare acknowledgment is not. Chan. Prec. 387. in Case of Andrews v. Brown.

## [T. b. 64] Living or Dead.

1. In dower the iffue was, whether the husband was dead or The baron's brothers and hving, two witnesses produced by the defendant proved the same others swore, argumentatively only; but not directly, but there being no that the baproof of the life of the baron, the proof of defendant was allowed; ron being a minister deand judgment for her. And. 20. pl. 42. Pasch. 2 Eliz. Thorn v. parted this Rolfe.

kingdom ift Mary prop-

ter religionem, and was absent these seven years in Germany, and that no merchant of Germany, nor English person who has travelled there can hear any tidings of him; wherefore they think in their conscience, that he is rather dead than alive, and no witness being [ 231 produced of his living, the plaintiff recovered. Dyer 185, pl. 65, Paich. 2 Eliz. S. C. Thorne v. Rolt.——Bendl. 86, pl. 131. S. C. and the pleadings.——And. 20, pl. 42, S. C. the widow examined with the planting of the plan mined witnesses who proved nothing positively, but by argument, but the tenant brought no proofs, and the demandant had judgment.—Mo. 14. pl. 35. S. C. adjudged, that seme recover her dower.—

2. Generally persons are presumed to be living if the contrary be not proved. 2 Roll. Rep. 461. Mich. 22 Jac. B. R. Throghton v.

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3. 19 Car. 2. cap. 6. f. 2. If fuch persons for whose life any of- A lease was tates shall be granted, shall absent themselves seven years, and no proof version to be made of the lives of such persons in any actions commenced for re- L. D. for covery of such tenements by the leffors or reversioners, the persons upon ninecy-nine whose lives such estate depended shall be accounted as dead; and the commence judges shall direct the jury to give their verdict as if the person ab- after the fenting himself were dead.

death or other looner determina-

tion of the estates of J. D. the father and J. D. the son lesses in possession of the like term, if they or either of them so long lived. In ejectment, the death of J. D. the son was positively proved, but as to the father proof was, that he was reputed dead, and not heard of in fifteen years; Holt Ch. J. was of opinion, that this case is within the statute, because L. D. the lessor of the plaintiff in ejectment had a term in reversion in the lands, and so was a reversioner within the very letter of the statute; and the defendant not being able to prove that J. D. the father was alive at any time within feven years last past the plaintiff had a verdict. Carth. 246. Trin. 4 W. & M. at Exon Affise. Holeman v. Exton.

4. 6 Ann. cap. 18. Such nominees or tenants of particular estates on affidavit in Chancery by any claimant to the reversion, Sc. that they have cause to believe such persons dead shall be ordered to be produced, and if not produced shall be taken to be dead; but if it appears afterwards, that fuch nominee or tenant was alive, fuch tenant, &c. may re-enter, and recover the mesne profits.

## [T. b. 65] Lost Deeds.

1. A release was offered to be deposed, that it had been seen by fome at the bar, it being affirmed, that by casual means it was loft;

but the Lord Chancellor faid the oath should be, that he faw it fealed and delivered, and not that he faw it after it was a deed; for in Munson the Justices Case, a deed was brought into the Chancery, and a vidimus upon it, being but a counterfeit copy, and after the fraud discovered, and the true deed produced, therefore no allowance to be given of a deed without producing the deed, or proving the execution thereof; and here appears what want we have of notaries and their deputies. Cary's Rep. 43, 44. cites Nov. 1 Jac.

2. A deed of uses was lost, and to supply it evidence was given, that the lost deed had formerly been shown in evidence in the Exchequer upon an alienation there questioned, the land being holden in capite, and the record thereof was shewn, and this was allowed for evidence. Clayt. 89. pl. 151. July 16 Car. before

Foster Judge of Assife, Wharton's Cafe.

5. P. accordingly, as to deed buint, boules, rebellion, or where robbers have destroyed them, the law, in to Rep. 92. Such cases of necessity, allows the proof of charters without be cited 28 the beautiful them. Jenk. 19. at the end of pl. 35. Necessitas facit licitum.

12 Aff. pl.

1b. the judges would not fuffer a deed to be given in evidence which was not produced and shewn to the jurors. But Ibid. 63.2. the Court said, that in the said Case of the casualty by sire, there ought to be great circumspection and discretion in the judges.

[ 232 ] 4. A proof that there was a revocation is sufficient for the heir without producing the deed itself, which was taken away by the defendant himself. Keb. 12. 13 Car. 2. B. R. Negus v. Reynall.

5. A lease recited in a release was admitted to be proved by the witnesses of the release, without shewing the lease itself, which was embexelled by Herbert lessor of the plaintiff. Keb. 12. pl. 23.

13 Car. 2. Negus v. Reynall.

6. The lease was lost, but three witnesses swore there was such a lease, and others swore that it was burnt, and taken out of the plaintiff's trunk by the defendant, which per Cur. is title sufficient to an estate without producing the deed; contra to a debt, because the party must say hie in Curia prolat. 2 Keb. 483. pl. 22. Pasch. 21 Car. 2. B. R. Moreton v. Horton and Thorner.

7. Recital of a former patent in an after patent is no evidence, without producing the first patent. 2 Lev. 108. Trin. 26 Car.

2. B. R. Cragg v. Norfolk.

8. In a quare impedit, the plaintiff declared upon a grant of the advowson to his ancestor, and in his declaration says hic in Gur' prolat, but indeed he had not the deed to shew. Serjeant Baldwin brought an affidavit into Court, that the defendant had gotten the deed into his hands, and prayed that the plaintiff might take advantage of a copy thereof, which appeared in an inquisition found temp. Ed. 6. Cur. When an action of debt is brought upon a bond to perform covenants in a deed, and the defendant cannot plead covenants performed without the deed, because the plaintiff had the original deed, and perhaps the defendant took

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not a counterpart of it, we use to grant imparlances till the plaintiff bring in the deed, and upon evidence if it be proved that the other party has the deed, we admit copies to be given in evidence. But here the law requires that the deed be produced; you have your remedy for the deed at law. I Mod. 266. pl. 17. Trin. 29 Car. 2. C. B. Anon.

9. A recovery was suffered in Ireland in the time of Oliver Cromwell, and the original was loft, but proof was made that there was an original. The question was, whether the Court might cause an original to be put upon the file, and fo supply the loss of it? The judges fent out of Ireland hither to fearch for precedents, for which they were much blamed by the Chancellor, for that by the law an original might be supplied, proof being made of it, though the recovery were fuffered in the time of another King, and to he faid it had been frequently done; that originals in King James's time had been supplied in King Charles's time, &c. 2 Freem. Rep. 30. pl. 33. Hill. 1677, Tregunell's Cafe.

10. Assignment of a lease to plaintiff's lessor is good evidence without the original leafe. Per Holt. Cumb. 340. Trin. 7 W.

3. B. R. Aftley v. Child.

11. A jointure deed was loft. It was proved that long fince the jointress levied a fine fur concepit, and denissed the lands to W. for 99 years, if she fo long lived, for securing the payment of 4001. who assigned the same to M. and both joined in a lease for 60 years to J. S. if the faid jointrefs should so long live, at the yearly rent of 260 l. This was admitted a fufficient proof of the jointure. 5 Mod. 211. Pafch.

8 W. 3. Barley's Cafe.

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12. And to the like purpose they produced depositions in Chancery, which they offered to be read, the bill and answer being taken off the file, and loft; but they offered to give an account that it was once filed, which was by the Six Clerks book, and produced an involment of the decree, which mentioned both bill and answer. And the Court being of opinion, that the jointure-deed being loft, they might fupply the proof by memorials thereof, fince it was impossible to [ 233 ] show the deed itself, the plaintiff had a verdict for so much as was in jointure. 5 Mod. 210, 211. Pafch. 8 W. 3. Barley's

13. Where a deed is lost or burnt, a copy or counterpart, or the contents will be admitted to be given in evidence, but not except it be proved that there was fuch a deed executed. Skin. 673. pl. 12. Mich. 8 W. 3. B. R. in the Cafe of K. v. Sir Thomas

Culpepper. 14. In ejectment, the plaintiff elaimed a title under a fettlement of his mother's ancestor, but could not produce the original fettlement, of which he gave this evidence, viz. He proved that it came to the hands of the Lady Baltinglass who was tenant for life, and died, and who, having committed a forfeiture by fuffering a common recovery, brought the deed to Mr. Gronge to advise with him about it; he proved likewife, that it was produced before a Master in Chancery in a fuit there depending, and that a copy of it was made,

but that Lady Baltinglass got the copy away; that this copy was produced at a trial at law upon a power as to making leafes, in which there was a special verdict found, and the settlement was set forth in bec verba, the record of which verditt was now produced; he proved, that a bill in equity was exhibited against my Lady Baltinglass, to avoid a lease made by her, and that the settlement was set forth in this bill, and admitted by the lady in her answer, so the plaintist had a verdict upon this evidence. 5 Mod. 384. 386. Hill. 9

W. 3. Matthew v. Thompson.

15. Where an old term was granted by a bishop to Queen Eliz. and by her affigned over, and by her affignee affigned over, as is supposed, to J. S. who, and several generations after him, have had and continued in possession, but the house of one of the family being burnt in the year 1643, where it is also supposed the original assignment was burnt, and twelve years afterwards a grant of the residue of the term mentioned to be a term of above 70 years, was held to be a good circumstantial evidence to prove the grant of the term from the affignee of Queen Eliz. L. P. R. 556. cites Mich. 11 W. B. R.

7 Salk. 296. pl. 19. 5. C. and S. P.

16. Recital of a lease in a deed of release is good evidence of a leafe, against releasor, and all claiming under him. 6 Mod. 44. accordingly. Mich. 2 Ann. B. R. Ford v. Grey.

17. Bare recital of a deed is not evidence; but if it could be proved that fuch deed had been loft, it would do, if it were recited in another. 6 Mod. 45. Mich. 2 Ann. B. R. Ford v. Grey.

18. Note, a fettlement of Sir G. Binion, under which the plaintiffs, who were his fifters, claimed, being loft, but being proved in Chancery by the plaintiffs themselves thirty years since, who were not then concerned in point of interest, but are since intitled by that deed, it was ordered that a copy of the deed should be admitted to be read at law, and likewise that the plaintiffs depositions should be read to prove the deed, although they now claim under the deed. 2 Freem. Rep. 260. pl. 329. Trin. 1702. Lady Holcroft and al. v. Smith.

19. Counterpart of ancient deed 1 ft is good evidence with other circumstances, but not of itself. But of a deed leading the uses of a fine is good evidence of it. 6 Mod. 225. Mich. 3 Ann. B. R.

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20. The counterpart of an ancient deed was admitted in evidence, and a special verdict being found in the case, finding the original deed it concluded prout per the counterpart it did appear; and this was done to preserve the precedent; cited by Holt Ch. J. 6 Mod. 225. Mich. 3 Ann. as in Ld. Hale's time, Mayow v. Comb.

21. And now all the Court held that the counterpart of the ancient deed which might be loft, was good evidence with other circum-[ 234 ] fances, but not of itself without other circumstances; but that the evidence. 6 Med. 225. Mich. 3 Ann. B. R. Anon.

22. In a trial in ejectment between Sir Edward Seymour and MS. Rep. is his mother in law, the Court allowed the contents of a deed to be given in evidence by witnesses, who put the contents of it in

5. C. in a thus, viz. A. deed under which Sir

writing upon memory 4 or 5 days after the reading the deed. The Ed. Seymour Court feemed of opinion that in case a deed was lost by some made title in an ejectinevitable accident, that there it might be proved by copy. But ment on a in case there was no copy the contents of it could not be proved trial at bar from the memory of those that knew the deed, and though it in B. R. was in the hards was hard for a man that had no copy to lose the benefit of his of my lady deed, yet the admitting that fort of evidence would be greater. his mother-But here the opinion of the Court was founded upon a particular reason; for the deed by which the plaintiff was to prove his title testion of was not lost but proved to be in the hands of the defendant; fo that in Maidenthis case the danger of allowing this fort of evidence is none brade in at all; for if the defendant was wronged by any parol evidence question) and it was in her power to fet all right by producing the deed. 10 was the Mod 8 Pafeb o Ann B R Sir Edward Seymour's Cafe. Mod. 8. Pasch. 9 Ann. B. R. Sir Edward Seymour's Case.

It was proved that ai-

ter the death of his father in Devon, the deed was seen at his house in Dover-street, Westminster, and there read over to the attorney of Sir Edward Seymour and others, who had a commission from the Prerogative Office to infpect the personal estate of his father, and afterwards it was put into the scrutore, which was carried to Maiden-Bradley in Wiltshire, where it was again taken out of the scrutore and read over by my lady's attorney in the presence of several persons. This was held good evidence of there being such a deed; per Parker Ch. J. Powel and Powys, though it was objected there ought to have been some account given of the execution of this deed, and by whom. It was sworn by one witness that the father's name was to the deed, and by another witness that Sir Robert Clayton's name (a trustee) was to the same also, but who the rest were that signed, sealed and delivered it could not be proved, nor who were the witnesses indorsed on the back of the deed, and it was held that the proving the deed in this manner could do no harm, for if it was not true it was in the power of the defendant to thew the contrary. But when the plaintiff's witneffes came to prove the contents of the deed, and particularly the uses, there was some variance in the evidence, and the plaintiff was thereupon nonfuited. Pasch. 9 Ann. B. R. Sir Edward Seymour's Cafe.

#### [T. b. 66] Malicious or vexatious Profecutions, &c.

1. In an action upon the case for maliciously prosecuting of an 2 Keb. 572. indictment for perjury against him, of which he was acquitted, Pl. 85. S. C. upon not guilty pleaded it appeared upon the evidence that the defendant was a justice of peace, and procured some as witnesses to appear against bim, and his own name was indorfed upon the indictment to give evidence. The Court agreed this did not make him a profecutor; for if a justice of peace knows any perfon that can give evidence against one that is indicted, he ought to cause him to do it. But it was proved on the defendant's fide, that this indictment was drawn up by an order of the fessions; wherefore Kelynge Ch. J. faid that the plaintiff deserved to be bound to his good behaviour for bringing the action. I Vent. 47. Mich. 21 Car. 2. B. R. Girlington v. Pitfield, S. C.

2. Nonfuit is sufficient evidence that there was no cause of replevin, at least it is evidence of a vexation. Per Holt Ch. J. 12

Mod. 547. Trin. 13 W. 3.

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3. In case for a malicious prosecution for felony, brought after acquittal, it was agreed that the declaration must agree with the indictment substantially; and here the indictment being for stealing unum fintinculum, Anglice a callico quilt, and the declaration umum sinitunculum, it was adjudged a material variance; but the declaration having besides laid generally, that he charged the plain-

tiff with felony before a justice of peace, it was held sufficient to maintain the action; and likewise that it was necessary here for defendant to prove a felony \* committed, and a probable cause of suspicion. 12 Mod. 555. Trin. 13 W. 3. Anon.

## [T. b. 67] Manor and Contents of a Manor.

- 1. In ejectment, a lease was pleaded of a manor, whereof the fields in which were parcel. Issue was joined quod non dimission manerium. It was found, that there were not any freeholders, but diverse copyholders, and that it was always known by the name of a manor; adjudged, that this shall pass for him who pleaded the demise of the manor. Arg. 2 Brownl. 223. Hill. 7 Jac. B. R. cites Finch v. Durham.
- 2. A. in forma pauperis had a decree against C. for the manor of B. that the contents of the manor were doubtful. C. shewing ancient deeds, that proved divers parcels of the lands claimed by force of the decree by A. to be of another manor, which notwithstanding the Lord Chancellor Egerton ordered, that it should be put to jury, and they to find as the contents of the manor had gone by usual reputation sixty years pass, and not to have it paired, and defalked by such ancient deeds. Cary's Rep. 33, 34.

## [T. b. 68] Mariners Wages.

1. If a ship be bound for the East-Indies, and from thence to return to England, and the ship unlades at a port in the East-Indies, and takes freight to return to England, and in her return she is taken by enemies; the mariners shall have their wages for the voyage to the East-Indies, and for half the time that they stayed there to unlade, and no more; ruled by Holt Ch. J. June 4, 1700, at Guildhall at Nisi Prius. Ld. Raym. Rep. 739. Anon.

## [T. b. 69] Marriage.

- 1. Constant reputation shall be allowed proof of marriage and orders; per Holt Ch. J. Cumb. 202. Pasch. 5 W. & M. in B. R. Dr. Harscot's Case.
- 2. What can be greater evidence in a Court of law to fhew that there was no marriage than a fentence in Spiritual Court carried on in a regular fuit, and pronounced in the life-time of the parties, that they were guilty of fornication, and proof of the commutation money paid by the supposed father. 8 Mod. 182. Trin. 9 Geo. in Case of Hiliard v. Phaley.

3. Entry of marriages in a church-book no evidence of the marriage, unless the identity of persons be proved or strengthened with proof of cobabitation or allowance of parties. MSS Tab. Jan. 28th, 1718,

Draycott v. Talbot.

4. For the proof of a marriage was given in evidence cohabita-

tion for twenty years, that they came from Lincolnshire to London, lodged together in Wild-Street, that the husband was a papist, and were married by fuch a one who was the Portugal Ambaffador's Chaplain, for which reason no other person was present, that he in his life-time acknowledged she was his wife, and desired the witnesses to use her as such, and that a little before and on the day of his death, declared in the presence of his physician, and several others now produced as wirnesses, that he was married to her. 8 Mod. 180. Trin. 9 Geo. Hiliard v. Phaley.

5. A. and M. were married at the Fleet-Prison by different names, and an entry was made in the register there of the marriage there such a day, between Robert Marshall and Anne How, of &c. not being the names either of the man or woman; this was adjudged in the Spiritual Court to be a good marriage, and [ 236 ] that sentence affirmed in the Delegates; and on a trial at bar between a daughter of that marriage and a daughter of a former marriage, the father being dead, it was found a marriage. Wms's Rep. 676. Mich. 1720. Pool v. Sacheverel.

6. A marriage was not allowed on a trial, it being fignified to the Court, that a fentence in the Arches had been given that there was no marriage, and the Temporal Courts must give credit thereto till it is reverfed, it being a matter of meer spiritual cognizance. Carth. 225. Pasch. 4 W. & M. B. R. Jones v. Bow.

#### [T. b. 70] Marriage Agreement.

1. In debt upon an obligation, Cook Ch. J. faid, and that fo was the opinion of the civilians, that a difagreement to the marriage had under the age of confent at the age ought to be published in Court, otherwise the issue may be bastarded; for a disagreement in writing is not sufficient disagreement, nor a good proof. Noy. 153. Anon.

2. Agreement on marriage was to fettle 500 l. per ann. jointure. Lands were fettled, but they were worth only 400 l. per ann. Decreed by Jeffries Ch. to make up the lands 500 l. per ann. and this on the evidence of the father and uncle, that when the busband proposed the treaty of marriage he offered to fettle 500 l. per ann. and after took notice the jointure fettled was not of that value, and talked of making it up so much-But no covenant or agreement proved whereby he bound himself to make a jointure of that value, and the portion not equivalent; but the husband was trusted to draw the settlement. Vernon 17. Mich. 1681. Benfon v. Bellasis.

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3. In an affumplit on a contract to marry, any lawful impedi- Ld. Raym. ment may be given in evidence, as that the parties were within Rep. 386. the Levitical degrees, &c. for this makes the promife void; but 12 Mod. it is otherwise of a pre-contract; per Holt Ch. J. 5 Mod. 412. 214. S.C. Mich. 10 W. 3. Harrison v. Cage & Ux.

If fuch a promise is

not in writing, defendant may give in evidence the statute of 29 Car. 2. 3. Vid. 3 Lev. 65. Philpot

v Wallet.—5. C. cited 2 Salk. 438. by the reporter.—If the woman's promise does not bind, the man's promise is but nudum pactum, and therefore it is actionable either on both sides, or on seither side. I Salk. 24. pl. 4. S. C.—

4. S. was indicted for forcibly taking, carrying away, marrying, and carnally knowing P. R. a virgin having an eflate, &c. Holt Ch. J. fummed up the evidence, and gave the following directions to the jury. 1. You are to know that if the was taken away by force, and afterwards married though by her confent, yet is he guilty of felony; for it is the taking away by force that makes the crime, if there be a marriage though by her confent. 2. In the next place it is to be observed, that she was taken by force, and a stratagem was used to give an opportunity thereunto, and the arrest was but a colour. 3. You may consider upon the evidence how far the prisoner was concerned in the first force: it is true he was not at the arrest, and did not appear till she was brought to H's house, and under the pretence of bailing her, she was carried to the Vine tavern, where there was a parfon ready, and the marriage was had in fuch a manner as you have heard; now it is left to you to determine whether the marriage was not the end of the arrest; and if so, how it could be possible for such a force to be committed to effect the prisoner's defign, and he not privy to it. 4. If it can be imagined he was not privy to the colourable arrest, yet she was under a force when he came to her at H's bouse, and from thence she was carried by force into the Vine tavern, where she was married. That is a forcible taking by him [ 237 ] at H's house, and though when she was at the Vine tavern she did express her consent to be married, yet it appears that even then the was under a force, and had no power to help herfelf. She was also under a force when she was carried to B's, and put to bed, nay, when she was carried to the justice of the peace, even then she was under a force, and all that she said was not freely, but out of fear; fuch a fear would avoid any bond, for the was under imprisonment; but however, if the first taking was by force, and she had consented to the marriage, the offence is the same, it is felony. He was convicted and executed. Holt's Rep. 319. Mich. I Ann. B. R. Swensden's Case.

3 Salk. 16. S. C. held accordingly. —Ibid. 64. pl. 5. S. C. held by Holt Ch. J. aceordingly.

5. If there be an express promise of the marriage by the man, and it appeared that the woman countenanced it, and by her actions behaved herself so as if she agreed to the matter, though there be no actual promise, yet that shall be sufficient evidence of a promise of marriage on the woman's side. Per Holt Ch. J. 6 Mod. 172. Pasch. 3 Ann. B. R. Hutton v. Mansel.

## [T. b. 71] Modus Decimandi.

1. The furmife to have a prohibition was, that the inhabitants of D. of which he is an inhabitant, have paid unum mod. decimand. and they were at iffue; and he proved only that he himself had paid it; and yet well and no consultation, for every particular is included in the general, and proved by it, and it appears sufficient matter for a prohibition, and to oust a Spiritual Court of their

their conusance. 2dly. Agreed, that where the statute appoints proof of the furmife to be by two, it is fufficient, if two affirm that they have known it to be so, or that the common fame is so. Noy. 28. Anon.

[T. b. 72] Money received or laid out to a Man's Use.

1. In an action upon the case for money received by the defendant for the use of the plaintiff, the evidence was, that the defendant was apprentice to the plaintiff, and this was for fervice done in a ship of the King's during the apprenticeship, and the indentures of the apprenticeship being produced to prove the defendant apprentice to the plaintiff, it was infifted that the band of the defendant ought to be proved, to which Holt Ch. J. agreed, unless the indenture be enrolled. Skin. 579. pl. 2. Pasch. 7 W. 3.

2. In case for money had and received to the plaintiff's use, the evidence that the plaintiff's wife was executrix, and that the money was paid to the defendant as due to her, and the plaintiff was nonfuited, for it being paid without any authority from the husband it remains as a debt due to the executrix, and the action ought to have been by baron and feme as executrix, and if the baron had died, the feme might bring an action for it, but if the money had been received by authority from the husband, then it had been as his receipt, and as his money, and the action in his name alone had been well, and the money would have been affets in her hands.

1 Salk. 282. pl. 10. Pafch. 8 W. 3. B. R. Anon. 3. Action upon the case was brought for money received to the use of the plaintiff, the defendant would have given evidence upon non assumplit, that the money was condemned upon a common attachment within the city of London, the which was opposed, because the condemnation was after the action commenced in the Courts above, to which it was answered, that though it was after the action commenced, yet it was before non affumpfit is pleaded, and so well enough; non allocatur; for the difference is where the condemnation is before the action commenced, there the de- [ 238 ] fendant may plead non affumpfit, and give the attachment in evidence, but where the condemnation is after the action commenced the defendant ought to plead it, Skin. 639. pl. 3. Pafch. 8 W. 3. B. R. Briat v. Gyll.

4. In account the case on evidence was this, A. gives a note to B. upon C. for B. to receive it for the use of A. B. owes C. money, and C. upon this note discharges B. thereof, whereupon A. brings his action against B. and it lies. 12 Mod. 509. At Nisi Prius at Guildhall. Coram Holt. Pafch. 13 W. 3.

5. A. orders B. to receive money from C. for him, B. orders C. to pay the money to D. to whom B. owes money; C. accordingly does pay it; A. shall maintain an action against B. as for so much money received to his use. Per Holt Ch. J. 12 Mod. 565. Mich. 13 W. 3. Anon.

6. So

6. So if in that case B. had drawn a bill upon C. for the money, or generally for so much money, if C. has no effects of B's in his hands; his answering such bill is a payment of A's debt to B. for which A. may maintain his action against him. Per Holt Ch. J.

12 Mod. 565. Mich. 13 W. 3. Anon.

7. In an action for money laid out to defendant's use; it was held upon evidence, that promissory note given to the plaintiff's testator to allow a young student at Cambridge 20 l. per annum, would not maintain the declaration, though it appeared the testator bad laid out this sum yearly for the defendant, because the defendant refused to do it himself. Barnard Rep. 301. Hill. 3 Geo. 2. 1727. Goody v. Mosely.

#### [T. b 73] Mortuary.

1. On issue whether mortuaries were due by custom or not, the account-book of receiving them by an impropriator was allowed at Winchester Lent Assies 1719. Coram King Ch. J. in a Rumsey Cause, and he said he could not distinguish this from a parson's book, which was always in the Exchequer. Per cursum Scaccarii, though he could not give a reason for it.

## [T. b. 74] Murder of Bastards.

The statute of 13 Elia.

oncerning being born alive would have been a bastard, and she endeavour privately, bustard childer, does not extend to the case of a child born of a whether it were born alive or not, but be concealed: The mother so a child born of a woman by one witness that the child so intended to be concealed was born married, whose hus-

band was not within the King's dominions when the child was begotten or born. Two orders were made for the reputed father (not the hufband) to maintain it; but it was moved to quash it, because the statute of 18 Eliz. gives the justices no justification but where the child was born out of lawful matrimony; and because it was not alledged in the order that the husband was beyond sea for the space of forty weeks before the birth of the child, and it is not sufficient to say that he was beyond sea at the time of the conception, because that is what in nature cannot certainly be known. And for this last reason the orders were quashed; but the Court bound the defendant by recognizance to appear at the next quarter selfons for Middlesex, being inclinable to bring the case within the statute of 18 Eliz. because of the frequent mischies of this kind which have happened among seamen's wives. Carth. 469, 470. Mich. 10 W. 3. B. R. The King v. Alverston.

# [ 239 ] [T. b. 75] Nonage.

1. If the question upon a writ of error brought to reverse a fine or recovery for nonage, Whether the party be of full age, or within age? It shall be tried by the Court by inspection of the party during his infancy, and not by a jury. Hill. 22 Car. 1. B. S. But there must be other concurrent proof made to the Court, as well as by viewing the party, viz. by producing the parish register-book where the person was christened, and also affidavits

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of some persons who can swear to the time of the birth; for the Court may be deceived, if they should rely only upon the view of the party. L. P. R. 46.

## [T. b. 76] Non Affumplit.

1. There is a diversity between affumplit in fact and affumplit in Quere, if law; for on affumpfit in fact, and non affumpfit pleaded, a release upon non afcannot be given in evidence to toll the affumpfit, but only in mitiga- pleaded (be tion of damages; but upon affumpfit in law, and non affumpfit it in fact or pleaded, a release may be given in evidence, because the assumpsit in law) the is tolled by it; agreed per Cur. Sid. 236. pl. 3. Hill. 16 & 17 may give in Car. 2. B. R. Beckford v. Clarke.

performance. Ibid.

2. In an indebitatus affumpfit for money lent, the defendant And though pleaded non affumpfit, and gave infancy in evidence, and it was lent waslaid agreed by ten judges, that upon the general iffue fuch evidence out in nehad been of late admitted. I Salk. 279. pl. 4. Pasch. 5 W. and cessaries, M. in C. B. Darby v. Boucher.

yet that will not by matter ex post facto

entitle the plaintiff to an action; this was held clearly by Treby Ch. J. in S. C. Ibid .-

3. Feme covert may plead non affumpfit, and give coverture in evidence; because coverture makes it no promise. 6 Mod. 230. Mich. 3 Ann. B. R. Anon.

## [T. b. 77] Non Compos.

1. Devising a greater estate in land to a younger than to an elder fon, and limiting a remainder over in tail on either of his faid fons dying with (instead of without) iffue, is no evidence of testator's being non compos. 8 Mod. 59. Mich. 8 Geo. Burr v. Davall.

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## [T. b. 78] Non est Factum.

I. In debt upon an obligation the iffue was non eft factum; the Ow. 8. Mijury found that the defendant did feal and deliver it as his deed, but S C. and that after the day of the iffue joined, the feal was pulled off from the judgment for obligation. The plaintiff had judgment; for it was the defendant's the plaintiff. deed at the time when the issue was joined, and the trial shall \$3. pl. 2. relate to it, altho' the deed was cancelled afterwards. Cro. E. S. C. ad-120. pl. 8. Mich. 30 & 31 Eliz. B. R. Michael v. Stockwith.

the plaintiff,

for there was no fault in him.

\* 2. Non est factum cannot be pleaded generally upon the statute of usury, or the statute of sheriffs; per Cur. Hob. 72. in pl. 86.

3. If two men are bound jointly, and the one is fued alone, he [ 240 ] may plead this matter in abatement of the writ, but he cannot plead

plead non est factum; for it is his deed, though it be not his fole deed. Co. Litt. 283. a.

4. Feme covert may plead non est factum to a bond, and give coverture in evidence. 6 Mod. 230. Mich. 3 Ann. B. R. Anon.

#### TT. b. 701 Notice.

1. Upon iffue of notice to a patron upon refusal for illiterature. quære. If fixing a note to the church-door will be sufficient evidence. Dy. 327. b. b. pl. 7. Mich. 15 & 16 Eliz. Anon.

2. Being told by persons of good credit all along the road of the parl. prorogation, is good evidence of notice in an action of false imprisonment. 2 Show. 300. pl. 302. Pasch. 35 Car. 2. B. R. Verdon v. Deacle.

Prius at Guildhall.

11 & 12

of Rice v.

Oatefield.

3. If a husband and wife cohabit, and the wife deals separately, pl. 2. S. C. her contracts shall charge the husband; for cohabitation is sufficient evidence of notice. 6 Mod. 162. Pasch. 3 Ann. B. R. Langford v. Administrator of Tyler.

#### [T. b. 80] Not taking the Oaths.

- 1. Record of sessions given in evidence to prove the plaintiff had Geo. 2. S.C. not taken the oaths, per Holt Ch. J. this record is evidence. cited in Cafe Indeed, if there is a mifentry, it may be supplied and corrected by other evidence, for he should not be concluded by the mistake or negligence of the officer; but still 'tis a record, and some proof, though not a compleat proof, and might be left to the jury. 1 Salk. 284. pl. 16. Mich. 12 W. 3. Thurston v. Slatford.
  - 2. Upon any trial for forfeiture for not taking the oaths, &c. or making such registry as aforesaid, a certificate thereof under the hands of the proper officer shall be allowed as evidence of the defendant having taken the faid oaths, or subscribed such declaration of fidelity, or taken the effect of the abjuration oath respectively as aforesaid.

# [T. b. 81] Nul Disseisin.

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1. If in affise the tenant pleads nul tort nul disseisin, he cannot give in evidence a release after the disseisin, but a release before the diffeifin he may; for then upon the matter there is no diffeifin. Co. Litt. 283. a.

# [T. b. 82] Number of Acres in a Fine.

1. On trial in the north, whether lands were comprized in a common recovery or not, being as described but 28 acres, yet the fact was they were 120 acres; yet bene, because the intent of the party is what is to govern in these cases, and these 28 acres shall not go according to statute, but the estimation of the parties. Per King Chan. Trin. Vac. 1727.

#### [T. b. 83] Nufances.

1. In an indictment for erecting posts and rails in a highway, it was held necessary to prove, that the party indicted did set them up, for a continuation of them, or not suffering them to be removed, would not serve.—Hale Ch. J. said if there be no special matter to fix it upon others, the parish, where the highway is, ought [241] to repair it of common right. Vent. 183. Hill. 23 & 24 Car. 2. B. R. Austin's Case. The reporter makes a quere, why not the county? as in the case of common bridges. 2 Inst. 701.

2. To hinder the course of a navigable river is against Magna Charta 23. And any thing that aggravates the sact, though not directly to the issue, may be given in evidence upon it, as here taking of money to let people pass. And it is no exception to a witness here, that he contributes to carry on the suit, or that this publick nusance was to his private nusance; per Holt Ch. J. 12 Mod. 615. Hill. 13 W. 3. the King v. Clark.

3. It was ruled by Holt Ch. J. at the fittings at Westminster, Hill. 9 W. 3. B. R. in an indictment for a nusance, that the building of a house in a larger manner than it was before, whereby the street became darker, is not any publick nusance by reason of the darkening. Ld. Raym. Rep. 737. The King v. Webb.

4. A thing may be a nufance at one place, and not fo at another, as in Cheapfide; as flinking dye-water is not so at Taunton or Wellington being in the way of trade; coram Pengelly Ch. B. at Taunton Assistes, Lent 1729-30.

# [T. b. 84] Original Writ.

1. The certificate from the proper officer is the only way of trial rubat the original in the action was, and he having certified, that a quare claufum fregit was the original, the Court is bound to give credit to this certificate, Arg. and the Court was of the fame opinion. 10 Mod. 318. Mich. 2 Geo. 1. in Cafe of Doucett v. Chaplin, cites Cro. J. 108. 479. Noy. 4. Cro. C. 272. 281. Brownl. 96. Yelv. 108.

# [T. b. 85] Parcel of a Manor.

1. Of land being reputed parcel of a manor in the King's Case, how, and how in the case of a common person. 2 Roll. Prerogative, 186. [L. b.] pl. 5.

2. When the priories were suppressed a commission issued, and a certificate was made upon all the possessions and the value which belonged to the priories, and therefore it is good evidence upon an issue, if land was parcel of a priory or not, that the certificate

tificate makes no mention of it. Litt. R. 36. Trin. 3 Car. C. B. Anon.

[T. b. 86] Payment Modo & Forma.

1. Feofiment on condition, that the feoffor paid fo much money at pl. 1. S. C. Such a day and place. The defendant pleaded, that he paid the moaccordingly ney at the day and place modo & forma, and gave in evidence before the at N fi Prius day, and produced an acquittance testifying the same; and adat Guildhall, judged ill, for by his pleading he has made the day and place pleaded the parcel of the iffue, and fo restrained himself thereto; but this payment thould have been specially pleaded. Mo. 47. pl. 41. Pasch. 5 precisely at Eliz. Anon. the time and

place mentioned in the indenture .- Dal. 48. pl. 7. S. C. in totidem verbis with Mo. -- Godb. 10. pl. 14. Mich. 24 kliz, C. B. Anon. S. P. held accordingly; and Ld. Ch. J. Dyer faid, that the plaintiff's counsel might have demurred upon the evidence .-

2. In debt upon a bond of 40 l. for the payment of 20 l. at a day and place certain; the defendant pleaded, that he had paid the faid 20 l. according to the condition, upon which they were at [ 242 ] iffue; and at the Nifi Prius, the defendant gave in evidence, that he had paid the money to the plaintiff before the day, and the plaintiff had accepted it. All which matter the jury found specially, and referred the same to the justices; and it was said by the whole Court, that that payment before the day was a fufficient discharge of the bond; but because the defendant had not pleaded the fame specially but generally, that he had paid the money according to the condition, the opinion was, that they must find against the defendant, for that the special matter would not prove the iffue; and the Lord Dyer faid, that the plaintiff's counfel might have demurred upon the evidence. Godb. 10. pl. 14. Mich. 24 Eliz. C. B. Anon.

3. In debt upon bond, the condition was for payment of a leffer fum at a certain day and place. The defendant pleaded paythatpayment ment at the day and place. The jury find that he paid before the before that day at another place, and that the plaintiff accepted it. All the Court held, that payment before the day was payment at the day, and day as to ob. judgment for the defendant. Cro. E. 142. Trin. Eliz. C. B.

Bond v. Richardson.

intent and fense of the condition, and that the condition is thereby discharged; but otherwise it is of payment after the day, and that the day is material — Mo. 267. pl. 417. Pand v. Richardson, S. C. adjudged for the defendant. — O. 45. S. C. adjudged accordingly — Le. 311. pl. 432. S. C. reported to be adjudged for the plaintiff, but seems to be misprinted (plaintiff instead of defendant) and that by the very reason there given, viz. For (it says) the day is not material, nor the place, but the payment is the substance.—Sav. 96. pl. 176. S. C. adjudged, that payment and acceptance before the day is as good as payment at the day, and the plaintiff was barred.—S. C. cited D. 222. b. marg, pl. 22. adjudged accordingly.—But D. Ibid. in the principal Case there Pasch. 5 Eliz. Anon. it was held by Deer, Browne and Welshe justices contrary to the opinion of Serjeant Harper, that the jury is not bound on such evidence to find the payment according to the issue, because the truth is contrary.—Dal. 48, pl. 7. S. C. held by Dyer, Browne and Welshe, that the pleading ought to be special.—So in case of a covenant and a recognizance, for performance of it, the Court held, as to the payment at another place, and before the day, that the acceptance was fully sufficient to excuse the recognizance as well as the covenant upon which the recognizance depended. Cro. J. 434,

And. 198.

pl. 233. S. C. held,

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gar the and rec 43 7. pl. 2. Mich. 15 Jac. B. R. in Cafe of Holms v. Broket, S. P. admitted. - Godb. 10. pl. 14. Mich. 24 Eliz. C. B. the S. P. admitted. - 10 Mod. 147. Hill. 11 Ann. B. R. the S. P. admitted ..

4. The receipt in the mortgage-deed and condition of redemption on repayment of the money, and defendant's oath that he paid it, the Court inclined was evidence enough of payment of mortgage-money after 10 years against any person; but the plaintiff standing upon it that it was not sufficient as against the plaintiff, who claimed as jointress, there was farther evidence. Chanc. Cafes, 119. Hill. 20 & 21 Car. 2. Goddard v. Complin.

5. The case was, that a bargain and sale was pro diversis considerationibus generally, and this was admitted in evidence to prove money revera paid; and if it be paid by one of the bargainees, this is sufficient for all to raise the use unto all. See if it is paid to one of the bargainors, if that be not good also. Clayt.

145. pl. 263. Mar. 1650. Harley v. Thomfon.

6. It was faid by Glyn Ch. J. at a trial at bar, that if a deed 2 Wms's express a consideration of money upon the purchase made by the Rep. 205.

Trin. 625. deed, yet this is no proof upon a trial that the monies expressed S. P. were paid, but it must be proved by witnesses. Sty. 462. Mich. Case of Thurle v. Madison.

7. A goldsmith's note promising to pay is evidence of his receiving money. 1 Salk. 283. pl. 14. Hill. 12 W. 3. Ford

v. Hopkins.

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8. Adjudged, that where the iffue is payment at the day and place, in fuch case, payment before the day, or at any other place, is good evidence, for payment before the day is payment at the

3 Salk. 156. pl. 13. Mich. W. 3. Anon.

9. If a man contracts for goods, and after his carrying them away gives the feller a goldsmith's note for the money, this does not amount to payment; but if it were given at the time of the contract, [ 243 ] it would be prima facie evidence that it was taken in payment. And if a man upon a contract made before takes fuch a bill, and keeps it till the party on whom it is drawn becomes infolvent, in an action brought by him upon that bill against the buyer he shall be barred; but he shall recover the debt upon the original contract. Per Holt Ch. J. 12 Mod. 408. Trin. 12 W. 3. Anon.

10. If I fet my name as a quitnefs to a receipt, this is not in teftimony of the receipt of the money, but of the party fetting his hand.

Holt Ch. J. Exeter, Lammas 1706.

11. A receipt of the last half-year's rent, is evidence that all be-

fore was paid. Tr. per Pais, 7th edit. 315.

12. Plaintiff fold to the defendant 100 /. South-Sea stock for 400 /. the defendant upon the transfer produced a note of Mitford's and Martin's of 500 l. which the plaintiff received, and gave him a note on Mr. Brand his goldsmith for 1001. which the defendant received. The 500 l. note was given between 12 and I at the S. S. House, and Mitford and Martins lived in Cornhill, fo that the plaintiff might have gone immediately and received the money; but instead thereof, about 4 that afternoon, Vol. XII. being Coppin.

being the 19th of October, he gives the 500% note in at the Bank, who at II the next morning fent a fervant to receive the fame. Mitford and Co. paid from 8 till 9 that morning, and then stopped. The Ch. J. said the plaintiff was not obliged to go immediately to receive the money after the receipt of the note, though the goldsmiths lived so near, but had a convenient time by the law allowed, and left it to the jury whether this was fo, and they found for the plaintiff that it was not, and that there was no laches in the plaintiff. Coram King Ch. J. apud Guildhall, Hill. 7 Geo. Holms v. Barry.

13. The same day the like case was in B. R. coram Pratt Ch. J. inter Moor and Warner, and differed only in this, that the plaintiff here fent the note himself, and went the next day about 10 to receive the money, and the like direction and verdict was

given as in the former cafe.

14. P. had a running account with B. a banker, in whose hands he had 30001. B. paid him 10001. for which P. instead of a receipt, gave him a promissory note, who assigned it to H. B. became a bank: rupt; H. fued the note; and on the trial, P. not being able to prove that B. at the time of the affignment was a bankrupt, H. recovered, now bill is brought for an injunction, and to have a discovery whether the assignment was not made after the time it bore date. It was infifted, that though this was a promissory note, it should be considered only as a receipt, he having at that time money in hand, and could not be imagined he intended to be liable on the note at the fame time that fo much money was due to him; and if so, the 1000 l. should be taken as so much money paid and deducted out of the 3000 % fo should come in for his distributive share of 2000 l. of the bankrupt's estate, and not to be a creditor for 3000 l. and pay the 1000 l. I.d. Chancellor, If people are fo careless to give notes instead of receipts, it is more fit they should suffer than innocent people who know nothing of their transactions. Bill dismissed. Sel. Cases in Canc. in Ld. King's Time, 42, 43. 11 Geo. Pakenham v. Bland and Hofkins.

15. Where discounts are allowed by course of trade for prompt payment, or on balancing accounts at a first time, these allowances are as actual payments, and so to be understood and taken; per

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Ld. Chanc. King, 25 April 1729.

16. One of the subscribing witnesses to a conveyance, the confideration whereof was 81. faid, that he faw gold paid at the time of executing the deed, and that after the execution he heard the 244 ] vendor acknowledge that he had received his purchase-money; but Ld. Ch. Hardwicke faid this is not fuch a fufficient proof of the payment of the confideration-money in a deed as may be expected. Barn. Chanc. Rep. 189. Pafch. 1740. Fleetwood v. Templeman.

[T. b. 87] Pedigrees.

1. At a trial at the bar between Baxter and Foster, concerning the title of land, a copy of an inscription upon a grave-stone in

London was admitted in evidence to prove a pedigree. L. P.

R. 552. cites Mich. 1656. B. S.

2. Charter of pedigree, is no evidence of itself, without shewing the books and records whence it is deduced, to prove defcent, though the heralds fwore that the pedigree was deduced out of the records and antient books in the office. 2 Jones 224. Mich. 34 Car. 2. B. R. Earl of Thanet's Cafe.

3. A copy of an inscription on a tomb-stone, allowed to prove a

pedigree. Sty. 208.

4. Herald's books are allowed to prove a pedigree, but that is ThoughHebecause they have not better evidence, and this is their proper rald's books are allowed business about which they are employed, and therefore there is to prove a fome credit to be given to them, but they do not deferve much, pedigree, yet because they are so negligently kept. Skin. 623. pl. 17. Mich. this is be-7 W. 3. B. R. in Cafe of Steyner v. the Burgeffes of Droitwich. havenothet-

and Holt Ch. J. faid, that though an old manuscript found among the evidences of a family may be evidence, because an original; yet a copy would not. Skin. 623. pl. 17. Steyner v. the Burgesles of Droitwich .-

5. Inter Zouth and Waters apud Guildford Lent Affizes 5 Geo. A book out of the herald's office was allowed to prove the plaintiff was not descended from one William Zouch of Pilton, as also an old book of my Lord Oxford's library mentioning the pedigree of William Zouch of Pilton, which was figned by himfelf.

[T. b. 88] Perjury.

1. Evidence to prove a perjury may be given viva voce; agreed. Sid. 51. pl. 16. Mich. 13 Car. 2. B. R. Wicks v. Smallbrook.

2. Exception was taken to a witness, that he was convicted of perjury, and they offered a copy of a verdict, on which there was never any judgment in Oliver's time. But the Court would not admit the evidence, because all is discontinued by the alteration in the government. But it was agreed, that evidence might be given viva voce to prove him perjured; the other fide to establish the witness's credit, produced a pardon of the perjury; but per Cur. that will not do, for it cannot restore him to his credita Sid. 51. pl. 16. Mich. 13 Car. 2. B. R. Wickes v. Smallbrook.

3. Jews were fworn as witnesses by Keeling Ch. J. at Guildhall on the Old Testament only, and afterwards on its being moved in B. R. if this was an oath by the stat. 5 Eliz. cap. 9. which might be affigued for perjury, and the Court held that it was, and within the general words of facro-fancta Evangelia; fo of the common-prayer book that has the epiffles and gofpels; but by Windham that of a pfalm-book only it is not fo. 2 Keb. 314. pl. 25. Hill. 19 & 20 Car. 2. B. R. Robeley v. Langston.

4. An information was for perjury in ejectment, the defend- [ 245 ] ants justify upon not guilty; and now upon evidence to prove this perjury, one was produced to prove what one, fince dead,

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fwore upon the first trial, and it was allowed. Per 2 Justices against Keeling Ch. J. Raym. 170. Mich. 20 Car. 2. B. R. Taylor v. Brown.

5. Depositions of witnesses before commissioners in Chancery are not to be allowed as sufficient evidence to convict one of perjury, &c. Comb. 38. Mich. 2 Jac. 2. B. R. The King v. Baspole.

Carth. 220. S. C.— 6. Upon an information of perjury in an affidavit in C. B. made before commissioners in the country in a cause there, a copy of the affidavit produced, and proved to be made use of by him, upon a motion in the cause was held to be good evidence; but a copy of an affidavit only produced against a man, without proof that he made it, used it, or was concerned in the cause will not do. Show. 397. Trin. 4 W. & M. K. v. James.

7. In an indictment in perjury upon an answer in Chancery; ruled first, that the complainant in Chancery is no witness pending the suit. 2dly, That if the bill be dismissed he is a witness, 3dly, The bill being taken off the file, it is no evidence, for it is not a record after it is taken off the sile. 4thly, Though the bill taken off the sile be no evidence, yet a copy of the bill made when the bill was upon the file was read. 5thly, There being but the oath of the prosecutor, and so oath against oath, the defendant was acquitted. Skin. 327. pl. 6. Mich. 4 W. & M. Fanshaw's Case.

8. In an indictment of perjury before Holt Ch. J. at Guildhall ruled in evidence, First, That though the perjury be assigned in an affidavit made at Serjeant's-Inn; yet it is good if it be in Cheapfide, or any other place within the same county. 2dly, That it ought to be proved that the affidavit was read, and used against the party, for without using it the bare making of an affidavit, without producing and using it will not be sufficient. Skin. 403. pl. 39. Mich. 5 W. & M. in B. R. The King and Queen v. Taylor.

9. A false oath any way conducive to the matter in iffue, or a guide to the jury, though it be but circumstantial, is perjury. 12 Mod.

142. Mich. o W. 3. King v. Griebe.

10. If it be matter that tends to the discovery of truth, though but a circumstance, as that such a one wore a blue coat whereas he wore a red, it is perjury; but if he tell an impertinent story nothing to the purpose, then it is not so. 12 Mod. 142. Mich. 9 W. 3. King v. Griebe.

11. If a man speaks to the credit of a witness, which is not directly to the issue, yet if false, that is perjury. 12 Mod. 142.

Mich. 9 W. 3.

12. At a trial, the question was upon money lent, and it being objected, that it was improbable, the plaintiff being a cautious man, should lend such a sum without a note; a avitness was produced to prove that he had lent a greater sum to a person then in Court without a note, which person swore he did not; and upon motion to file an information of perjury against him for the oath, Court held it reasonable. 12 Mod. 142 Mich. 9 W. 3. King v. Griebe.

13. Man-

13. Mandamus to admit Morris to the freedom of the city of Lin- Carth. 449. coln, he having ferved feven years apprentice, which the mayor re- W. 3. B.R. fused, because he would not take the freeman's oath, he being a The King Quaker, but offered to make a folemn affirmation according to the v. Maurice late act, 7 W. 3. cap. 34. And the Court were of opinion, that Lincoln. he ought to be admitted on his folemn affirmation; for the office of freeman is no place of profit or office in the government within the statute; by his ferving the apprenticeship he had a right in the freedom, and his admission whereunto the taking of an oath is not effential; but only by custom; and the intent of the act was, that unless in those cases excepted by proviso, the affirmation of [ 245 ] a Quaker should be as available as his oath; and though it was returned in this case, that every freeman had the liberty to run a cow upon the common within the faid city, yet that will not alter the case. 12 Mod. 190. King and Morrice v. the Mayor and Commonalty of Lincoln.

14. To convict a man of perjury a probable evidence is not enough; but must be a strong and clear evidence, and more numerous than the evidence given for the defendant, for else it is only outh against oath. Per Parker Ch. J. 10 Mod. 194. Mich. 12 Ann.

B. R. in the Cafe of Q. v. Muscot.

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15. A person swore that he saw and read such a deed, and it proved on the trial to be only the counterpart which he faw, and yet held no perjury, because only a mistake. 10 Mod. 195. a case cited by Parker Ch. J. in Case of Q. v. Muscot.

16. Parker Ch. J. held that perjury may be committed in circumstantial matter; but it must be a very material circumstance, a circumstance of that weight, that without it he could not hope to find credit with the jury. 10 Mod. 195. in Case of Q. v. Muscot.

17. In an indicament for perjury in an answer in Chancery, though at common law, yet the false oath must be voluntarie & corrupte, and therefore if it appeared that the false swearing was in a point not material, it was an evidence that the oath was not corrupt, and fo it was determined in the Case of the King v. Musker in Ch. J. Parker's time, upon which the defendant was acquitted; and that to convict a person of perjury there must be more evidence than a simple oath, otherwise it would be only oath against oath. In this case the perjury was alledged to be in answer to a bill filed such a term, and the copy of the bill produced was an amended bill by order of the Court of a subsequent term, objected, that this was not the bill to which the answer was put in, for that was to the original bill, fed non allocatur, for the amended bill is part of the original bill. Coram Eyre and Fortescue J. apud Westminster. Mich. Vac. 6 Geo. The King v. Waller,

[T. b. 89] Poffession.

1. The law does ever favour possession as an argument of right, and does incline rather to long possession without shewing any deed, than to an antient deed without possession; and after a long possession omnia presumi debeant solenniter esse acta. 2 Inft. 118, 362.

2. Possession of fixty-nine years maketh no title in law to a common, if the commencement thereof can be shewed since the time of the reign of R. I. but the faid long possession is great evidence, and a strong prescription of the right of common, & stabitur prefumptioni donec probetur in contrarium, 2 Inft. 477. 2 Mod. 277, 278.

3. In ejectment on a trial at bar, the statute of limitations was infifted on; and this point was ruled by the Court, That the possession of one jointenant is the possession of the other, so far as to prevent the statute of limitations. I Salk. 285. pl. 19. Hill.

2 Ann. B. R. Ford v. Grey.

4. Ejectment at Launceston Summer Assises 1732, Coram Forteseue A. that where in order to remove an objection of twenty years possession, evidence was given of an entry about fifteen or fixteen years back, this bare entry is not sufficient, unless fomething more was done, or there had been some proceedings after it.

5. Where the tenements of a manor are fold to several persons, and the manor divided into parts, the enjoyment is the proper evidence to whom parts of any of the waste of manor do belong. Coram Pengelly Ch. B. at Exon Lent Assises 1729-30,

## [ 247 ]

#### [T. b. 90] Prescription,

1. Where feveral interruptions are proved to be made, it is an evidence against the custom. Ley. 56. Trin. 7 Jac. in Borough of Doncaster's Case.

2. The defendants prescribed for common for all cattle, &c. at all times of the year. In the evidence it appeared the sheep were excepted for some time in the year; Resolved per Cur. that they had failed in the prescription, and the evidence did not maintain the plea; and that the prescription should have been specially pleaded with this exception. Carth. 241. Pasch. 4 W. & M. in B. R. The King v. the Inhabitants of Hermitage, &c.

3. A prescription is capable of proof by shewing an usage of fuch a thing by antient witnesses, which is an evidence of a prescription; per Holt Ch. J. 12 Mod. 683, 684. Hill,

12 W. 3.

It Mod. 168. pl. 4. Pafch. 7 Ann. B. R. the S. C. the Court feem to incline that the pre-

4. Upon an iffue whether the tenentes occupatores ought to repair a fence (which is a thing not of common right) though by tenentes is meant owners of the fee-simple, and by occupatores those that claim under them, and the prescription is only annexed to the tenentes, yet it will be good evidence on a traverse of prescription, that the tenants for years have from time to time fenced and repaired, for perhaps the estate has not since time of memory been in the possession of the very owner of the see. ciently laid. I Salk. 336. Mich. 9 Ann. B. R. Starr v. Rokefby.

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## [T. b. 91] Priority of Birth.

1. A man had eight fons, the three last were all born at a birth. Question on ejectment, which was the eldest? They were baptized by the names of Stephanus, Fortunatus, and Achicus. Declarations of the father were proved, that Achicus was the youngest, and he took these names from St. Paul in his epistles. The fon of Fortunatus was lessor of the plaintisf and e contra, it was proved from the declarations of one M. F. who was a relation and at the birth, and upon the birth of the second child took a string and tied it round the arm to know the one from the other, &c. Objection was made, that the declaration of this woman was not evidence feeing it was fince the death of the fifth fon (the faid Stephanus, and all the other fons dying before him without iffue) when there was a discourse about this matter, but what this woman faid foon after the birth was allowed in evidence, when there was no prospect of a controversy; per Reynolds Ch. B. at Devon Affises Lent 1731.

[T. b. 92] Rape.

1. A woman's positive oath of a rape without concurring circumstances is feldom credited. If a man can prove himself to be in another place, or in other company at the time she charges him with the fact, this will overthrow her positive oath; so if she is wrong in the description of the place, where it was impossible the man could have access to her at that time; as if the room was locked up, and the key in the custody of another person, this will take off much from her evidence; and I remember one particular case at Hertford assises, where the woman deposed, that a gentleman ravished her in a pond that was dry at that time, and the prisoner brought evidence to shew, that the pond was then full of water, and upon this the jury acquitted him. 5 Readings on the Statute Law, 49.

# [T. b. 93] Records.

[ 248 ]

1. It was agreed clearly, that the Court, for reasonable cause at A record their discretion, may permit any matter to be shewn to prove a re- must be cord. Aleyn 18. Trin. 23 Car. B. R. Wright v. Pindar.

pleaded fub pede figilli, or elfe the

Court cannot judge of it, but if a record be given in evidence, though it be not fub pede figilli, the jury may find it, if they have any other good matter of inducement to prove it. Per Roll. J. Sty. 22, 34. S. C.—Hardr. 120. Arg. cites S. C. That in evidence to prove to a jury a diem clausit extremum out of the Exchequer, the record itself could not be found, but a warrant for it, and an entry of it in the docket book was proved, and upon demurrer it was adjudged no evidence, because a record cannot be proved but by itfelf.

2. In ejectment upon a trial at bar for lands in antient de- Mod. 117. mesne, there was proof given of a recovery suffered in the Court Green v. of antient demesse to cut off an entail a long time since, and that the Proud, S. possession

C. butthere possession had gone accordingly, but the recovery itself was lost, and that an ex- no copy of it was produced; but the Court admitted other proof emplifica. of it to be sufficient, and faid, that if a record is loft, it may be tion of a re- proved to n jury by evidence, as the decree in the reign of H. 8. for tithes in London is loft, yet it has been often allowed that there exhibited, was one. I Vent. 257. Pafch. 26 Car. 2. B. R. Anon. but not proved a

true copy, because it was antient, and faid that the Court-Rolls were burnt at Basing-house in the

So the de-3. The matter of a record lost may be proved by other evidence, eree in H.S. cited per Holt Ch. J. as the case of the University of Oxford for tithe is loft, a presentation by conviction of recusancy of Earl of Salop. yet it has I Salk. 285. pl. 16. Mich. 12 W. 3. B. R. in the Case of allowed that Thurston v. Slatford. there was one. Vent. 251. Anon.

#### [T. b. 94] Rector of a Church.

1. In ejectment for a rectory, the lessor of the plaintiff, after his proving his admission, institution and induction, must likewife prove his reading the articles, and his subscribing them, and his declaration in the church of his full and free affent and confent to all things contained in the book of common prayer, and that this was done within the time limited by the statute. Sid. 220. pl. 8. Mich. 16 Car. 2. B. R. Snow v. Phillips.

## [T. b. 95] Release

1. A deed of feoffment may be given in evidence as a release, if it be without livery. Clayt. 32. pl. 55. Assise August, 11 Car. Ballard v. Sitwell.

2. If award be, that a general release to the time of award may be given, a release to the time of the submission is a good gene-

ral releafe. 12 Mod. 8. Mich. 4 W. & M. Anon.

3. In indebitatus affumpfit, and non affumpfit pleaded, defendant produced in evidence a deed of composition which plaintiff had signed to take 7s. in the pound, and a receipt of the money which was paid to him, and in this deed was a covenant from the creditors that they would upon being paid release, &c. Per Ch. B. Reynolds, this being a covenant to release, is not to be as evidence of a release, which he would have allowed; for what dischargeth the promife or debt may be given in evidence, and this differs from a covenant not to fue, which in the Player's Case, Clayton [ 249 ] v. Kinaston, was held to amount to a release; and he said the acceptance of the 7 s. in the pound was a fatisfaction, and plaintiff ought not to recover. Devon Assises, Lent 1731. King v. Hill.

4. Non est factum was pleaded to a release made to A. and B. and now to prove this deed it was given in evidence, that A. formerly in an action with him had pleaded this release in bar, and

that the release was entered upon the record in hac verba, and now that record was shewed forth and read, being proved to be a true copy; and this was admitted for proof of this release. Clayt. 62. pl. 108, July 1638. before Barkley Judge of Assise. Anon.

[T. b. 96] Reputation of being Part,

1. E. 6. granted the manor of E. &c. cum pertinentiis & omnes terras, boscos, Sc. ( antehac cognit, usitat, accept & reputat, ut membrum vel parcel' manerii pradict') on a writ of intrusion for woods, the defendants pleaded this grant, and averred that the faid woods of L. and S. &c. ad tune et antea fuerunt reputat' ut parcel' maner' pradict' demur' & judic' pro regin'; for as to the objection that (ante has) is uncertain as to the time, when parcel, whether 10, 20, or 100 years, &c. Per Cur. it refers to the possession and time past, and there being no former time or possession mentioned, it shall refer to the last time possession past in the crown. Yet the word reputat' was too uncertain to be referred as it is here pleaded. without faying that it had been time out of mind parcel; and is not like cases of common same and voice to arrest a person suspected, or for the reputation of an infant baftard, which are things perfonal and transitory, and as a small time may induce and make a reputation, so it may destroy its continuance; it is a thing of common right, and doth not oppugn any verity, but to make things of inheritance to be reputed parcel of a manor, when in truth they are not parcel in facto & jure; this is against common right, and cannot be induced without a prescription. Common appendant is created at the time of the tenure, and fo need not be claimed by prescription as common appurtenant must, which can have no effect, nor be claimed but by prescription. But if the defendant made it issuable by pleading that these woods were, and had time out of mind been reputed parcel, &c. though in the case of a common person proofs of fuch an iffue may be by vulgar and common reputation of the people of the vill, or of other vills, Sc. yet in the case of the king the evidence must be by matters of record or writing, as by express valuation thereof between the prince and the subject in the particulars of the purchase, or in the surveys and books of accounts of the auditors, receivers, bailiffs, &c. always entered and answered in the rolls as parcel of the manor. Co. Ent. 380. b. 381. The Queen v. Wilkin and Imber.

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2. Bargain and sale of the chase of W. with all profits thereunto belonging, or therewith used, or reputed, or known as part thereof; the question was, whether certain woods lying on one side of the chase passed; the evidence was, that they had been severed from the chase by a hedge, and sometime the demesses of another lord, than he who owned the chase, but on the other side the evidence was, that the deer had used to browse in these woods for the space of 60 years, and that the keeper of the chase had his walk there for so long time; adjudged that though they shall not pass by those words (all that

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his chase of W.) yet they shall pass by the ensuing words (or reputed, &c.) for the usage for so long was sufficient to ground a reputation, that they were parcel of the chase. 2 Sid. 1. Mich.

1657. B. R. Dodfworth's Cafe.

Freem. Rep. 207. See Pollexf. 410. to 425. An argument prewrit it abated the record not

3. In a special verdict in ejectment, the case was, there were lands, which in truth were not parcel of the manor, and yet were pl. 212. S. lands, which in truth were not parcel of the manor, and yet were C. adjudged reputed as fuch; and a grant was made of the manor, and all accordingly. lands reputed parcel thereof; the jury found that these lands were formerly parcel of the manor, but divided from it, and afterwards united again to it, and in the possession of him who held the manor, and have fince been demised by copy of Court-roll; and per pared by the Curiam, these are great marks of reputation, and therefore the s. c. in a lands shall pass; but if the jury had found that the lands in writ of error, question had been reputed parcel of the manor and had found but there be-ing a mir-no more, it would not have passed; because the reputation take in the fo found might be intended a reputation for a small time, fo reputed by a few, or by fuch as were ignorant and unskilful. 2 Mod. 69. Pasch. 26 Car. 2. C. B. Lee v. Brown.

being removed, and fo it never was argued.

4. Constant reputation shall be allowed proof of marriage and orders. Per Holt Ch. J. Cumb. 202. Pasch. 5 W. & M. in B. R. Dr. Harfcot's Cafe.

## [T. b. 97] Request.

1. If three affume to pay or give, &c. upon request, &c. if the request be made to one of them it is good. Noy. 135. Breerton's Cafe.

2. It was faid by Wylde Recorder of London, and not denied by any one, That on a special request alledged in the declaration, that a request at any other time, though feveral years before may be given in evidence; but on a sapius requisit, it was agreed, that a request any time may be given in evidence. Sid. 268. pl. 19. Trin. 17 Car. 2. B. R. King v. Bray.

# [T. b. 98] Refignation.

1. In a quare impedit it was refolved and agreed by all upon evidence at bar, 1st, That a refignation to a proctor does not make the church void, until it be accepted by the bishop and acknowledged before him; fo that a presentation in the mean time was void. 2d, The special verdict finds an instrument under the feal of the bishop upon which was indorsed, that the refignation was acknowledged and accepted by the bishop; yet that is no absolute finding that it was a refignation in facto. Nov. 147. Smith v. Foaves.

## [T. b. 99] Retainer of a Chaplain.

that gives the qualification, is good evidence of the retainer. Litt. Rep. 1. Hill. 2 Car. C. B. King v. Frankwell.

2. But a copy of the retainer entered in the Faculty Office was not allowed. Litt. Rep. 1. Hill. 2 Car. C. B. King v. Frankwell.

#### [T. b. 100] Reviver of Promifes.

In assumpsit, upon non assumpsit infra sex annos pleaded, the evidence was, That after the six years the defendant assumed to pay, if the plaintiss would come to account; and it was ruled by Holt Ch. J. at Hertford, Lent Assiss 1701, March 25, that this did not revive the promise, because it was not an actual promise. I.d. Raym. Rep. 741. Sparling Executor of Sparling v. Smith.

#### [T.b. 101] Revocation.

[ 251 ]

1. Upon a trial at bar, the plaintiff made title by an act of parliament, 16 & 17 Car. 2. the defendant's defence was upon a proviso in that act, which faved all rights to the King, and estates before 1639, made with power of revocation by Sir Robert Carr the father, and then not actually revoked. The defendant would have fet up a fettlement made before that time, and proved it fealed and delivered before that time; and to prove that it was not actually revoked by Sir Robert Carr, offered an abstract of the deed, and a case made upon it, with an opinion all under the hand of Mr. Justice Ellis, with the depositions of Mr. Justice Ellis in Chancery, in a case between Sir Robert Carr the son and his mother, wherein it appears to be a deed in force after Sir Robert Carr's death, though now cancelled and cut in pieces; yet the Court refused it as evidence, and would not allow the deed to be read. Skin. 205, Mich. 36 Car. B. R. Scroop v. Carr,

# [T. b. 102] Right of Soil.

1. The Court feemed to incline that the foil of a path way belonged to him that had the land on both fides, and that is the case as well of a highway as of a path way; and it is good evidence to prove such matter, who hath used to cut down the trees, or cleanse the way. Cited 2 Le. 148. pl. 182. Trin. 30 Eliz. B. R. in Case of Berry v. Goodman.

## [T.b. 103] Riot,

1. To make a person guilty of a riot, there must appear to 2Salk. 504. be an unlawful assembly of three or more persons, with intent to do pl. 3. S. C. an accordingly.

an unlawful act which must be done. Arg. and agreed per Holt and Powell J. 11 Mod. 100. 102. pl. 8. Mich. 5 Ann. B. R. Queen v. Solely & al.

#### [T. b. 104] Sale by a Sheriff.

1. In an ejectment upon a fale by the sheriff of a term for years on fi. fa. it is not necessary to produce a copy of the judgment, as in case of an elegit or outlawry, for in this latter case the exigent and judgment must be produced. Devon. Lent 1711. Coram Powys.

#### [T. b. 105] Scienter.

1. Giving a party notice of a dog used to bite sheep is sufficient to fupport the scienter, if any damage afterwards happens; Coram Baron Cummins at Taunton Aff. Hill. Vac. 1727-8.

#### [T. b. 106] Seats in a Church.

1. In an action for a disturbance as to a feat in the church, the plaintiffought to prove the reparation in evidence, though he does not alledge it in his declaration, and because he did not do it the issue was directed against him by Hale Ch. B. For it appeared by the evidence, that the parish had built and repaired the faid feat. Sid. 203. Pasch. 16 Car. 2. at Winchester Assises, Stevens's Cafe.

# [T. b. 107] Seisin in Fee of the King and others.

1. Upon iffue, that the King was not feifed of B. tempore confectionis litt. patentium in dominico suo ut de feodo, it is good [ 252 ] evidence, that the King made a gift in tail of B. to A. remainder to C. in tail, and that after A. being attainted of treason, the King was feifed of B. and continuing in posteffion after A.'s death without iffue made the letters-patent; for by the death of A. without iffue, the remainder vested immediately in C. and his entry being saved to him by the general words of 33 H. 8. cap. 2. And the King having only the reversion in fee in him at the time of the grant, cannot be faid feifed in dominico fuo ut de feodo, though there was a rent and tenure incident thereto. Dy. 100. Culpeper v. Bufh.

> 2. Seifin of tenant to the pracipe being in an ancient recovery was allowed without proving. Per Hale Ch. J. Mod. 117. pl. 17. Pasch. 26 Car. 2. B. R. Green v. Proude.

> 3. Recovery of damages in case for disturbing of an office does not give seisin to maintain affise of the office. 2 Lev. 108. Trin. 26 Car. 2. B. R. Cragg v. Norfolk.

> 4. On iffue of feifin in fee, proof of a receipt of rent of fix years feemed not sufficient evidence of that seisin, but no one appear-

Med. 122. pi. 28. Anon. but

ing on the other fide, Prat Ch. J. left it to the jury, who found accordingly.

[T. b. 108] Settlement.

1. Plaintiffs were the defendant's fifters children, and on a bill against defendant (being an infant) to discover a deed, the question was, If defendant's father had settled lands on plaintiff's mother.—The proof was, that about two years before her marriage he had put her in possession of these lands, and had articled on her faid marriage to fettle them on her, and her heirs; and the defendant (then an infant) was a witness to the articles. But though there was no other proof of fuch deed of fettlement, yet the Court decreed for the plaintiff.—But it was conceived a hard case to decree an equity on a deed, which had no other proof. N. Ch. R. 94. 16 Car. 2. Kingston v. Manwarring.

## [T. b. 109] Simony.

1. Upon a long special verdict, the question came to be this, Whether or no a fale of an advorton with a covenant to prefent fuch a person as the bargainee shall nominate be a simoniacal contract, the church at that time being full of an incumbent by ufurpation, and a quare impedit then pendant to remove him, and by which he is afterwards removed. The Court seemed clearly to hold that it was fimony; for that the prefentation by usurpation being avoided, the church shall be now faid void from the death of the last incumbent, and so pleaded without taking notice of the usurpation, which was a mere nullity, and the judgment is an estoppel for all men to say the church is full; and if the church should be faid to be full upon an usurpation, that this would be a means to elude the statute; for then it is but getting one to usurp, and the patron may fell the avoidance to whom he pleafes, and then bring a quare impedit, and remove the ufurpation, and so the grantee come in. Skin. 90. pl. 7. Hill. 37 Car. 2. C. B. Walker and Hamersley.

2. A bond was produced conditioned to pay 100 l. a year generally, and they faid, that an action of debt was brought upon it; whereupon A. the obligor brought bill in Chancery to be relieved against it, by which he disclosed its being entered into for a simoniacal cause, to which it was answered in Chancery by the obligee, that A. was presented by C. but it appeared, that C. who presented A. acted as fervant for B. the obligee who was the patron. And upon producing the answer and other proceedings on the bill, Ld. Ch. J. Bridgman admitted the bill in Chancery for evidence; [ 253 ] but had no proceedings been upon it, he would not have allowed it. Sid. 221. pl. 8. Mich. 16 Car. 2. B. R. Snow v.

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3. An incumbent promoted by simony in the civil wars when there were no bishops, and consequently no administration and justification,

tification, as the old statute appoints; yet this was held to be

fimony. Sid. 221. Snow v. Philips.

4. No evidence of simony shall be given, unless the party supposed to be guilty of it be then living, or were in life-time convicted of the said simony at common law, or in some ecclesiastical Court. 1 W. & M. cap. 16. sec. 2.

## [T. b. 110] Sola & feparalis Pastura:

1. It would not be fufficient to prove an usage for the sole pasture to shew, that the tenants had only fed it, unless it were proved also, that the lord had been opposed in putting in his cattle, and the cattle impounded from time to time; per Hale Ch. J. Vent. 165. Mich. 23 Car. 2. B. R. Hoskins v. Robins.

## [T. b. 111] Solvit ad Diem.

1. Upon riens arrear, payment before the day is good evidence to maintain the issue, for thereby the debt is discharged; contra when it concerns an act to be done, for an act at one day is not an act at another. If an executor pleads payment at the day by himself, payment before the day by the testator is not sufficient, though it discharges the duty at the day. Dal. 48.

pl. 7. Anno 5 Eliz. Anon.

2. Upon iffue of payment according to the condition, the condition was, That if the obliger would pay 10 l. immediately after the obligee shall enfeoff him of a mill, &c. it is no evidence that he paid 5 l. before and 5 l. after, for the money was no duty till the feoffment, and so it cannot be intended parcel of that sum; contra where a certain day is limited, for then it is a duty before the day. On plea of payment at the day the jury find payment before, and good, because payment before is payment at all times. Dy. 222 b. pl. 22 in marg. cites Trin. 9 Eliz. Anon.

3. In debt upon a bond of 40 l. for the payment of 20 l. at a day and place certain; the defendant pleaded that he had paid the faid 20 l. according to the condition, upon which they were at iffue, and at the nifi prius the defendant gave in evidence, that he had paid the money to the plaintiff before the day, and that the plaintiff had accepted of it; all which matters the jury found specially, and referred the same to the justices. And it was said by the whole Court, that that payment before the day was a sufficient discharge of the bond; but because the defendant had not pleaded the same specially, but generally, that he had paid the money according to the condition, the opinion was, that they must find against the defendant, for that the special matter would not prove the issue; and the Lord Dyer Ch. J. said, That the plaintiff's counsel might have demurred upon the evidence. Godb. 10. Mich. 24 Eliz. C. B. Ation.

4. If a bond be of 20 years standing, and no demand proved thereon, or good cause of so long forbearance shown upon a solvit ad

diem, Holt Ch. J. faid he should intend it paid; a fortiori on a note, if it be any confiderable fum. 6 Mod. 22. Mich. 2 Ann. B. R. Anon.

#### [T. b. 112] Submission to Arbitration.

[ 254 ]

1. In affumplit defendant pleaded a submission of all matters in difference to arbitrament, and award, &c. The plaintiff denied the submission modo & forma, issue was joined. The evidence was a submission of all matters touching accounts, and because plaintiff could not prove other matters in difference but matters of account, it was allowed good evidence, and he was nonfuited. Allen. 90. Mich. 24 Car. B. R. Johnson v. Rawle.

## [T. b. 113] Such Liberties.

1. Where the vill of L. claims liberties by grant of the King by these words, such liberties and franchises as the vill of N. has, &c. they ought to shew record or prescription proving what liberties and franchifes N. bas, and then well, as it feems there. Br. Patents, pl. 31. cites 20 E. 3. and Fitzh. Avowry 129.

#### [T. b. 114] Surrender of Leafe, Office, &c.

1. In the Case of Jay and Rider, as it was told me, Wynd- This was a ham faid, that contract by trustee to make a new lease is a present lease granted in King furrender of the old lease of ceftuy que trust, being by his Edward affent; which Foster and Twisden doubted; but all agreed such 6th's time contract to be good evidence to a jury of a furrender; and it for 99 years by a prebenwas fo found by verdict. I Keb. 285. pl. 23. Pafch. 14 Car. 2. dary, to B. R. Anon.

after other

leafes expired, leffee employed friends to take new leafes of fucceeding prebendaries in trust for him. The question was, whether this was a surrender of the antient lease, for the Court seemed to think that it was good evidence against so ancient a lease. But the next day the jury came and found that it was not a surrender; and (the reporter says) it seems not reasonable that a lease in trust, and which is in another person, and made in majorem cautelam shall be a surrender. Sid. 75. Gie (al. Gee) v. Rider.

# [T. b. 115] Tender.

1. Where a tender is to be pleaded to an indebitatus affumpfit, it must be a tempore confectionis promissionis, &c. and therefore if the money be demanded afterwards, the plea will be against the defendant, and then the best way is to pay the money into Court; the plea of tender is not good if alledged after a request. 1 Lutw. 227. Hill. 2 & 3 Jac. 2. Johnson v. Mapletoft.

2. As to tender of goods to be loaded on board a veffel, Holt Ch. J. took a difference between cumbersome and portable goods. That if a tender be made of cumbersome goods to a ship, which is not moveable from one part of the key to the other, I am not bound to carry them to the ship-side; but if I bring them to a con-

venient

venient place from whence I may load them on board, and offer the mafter to fend them on board, this is a good tender. Show. 149,

150. Pafch. 2 W. & M. Stone v. Gilliam.

3. If refusal be averred, it is good evidence of a tender to the person, which would be good at any time of the day, because the averring of a refufal implies the defendant's being prefent, who ought to accept it; but if the party were not prefent, it ought to be shewed, that he did not come, and that you were there, and made tender on the time of the day on which the law appoints it to be done; and that is the last time of the day [ 255 ] on which it may be done conveniently; per Holt Ch. J. 12 Mod 531. Trin. 13 W. 3. in Cafe of Lancashite v. Killingworth.

[T. b. 116] Things done at a former Trial.

1. None can be admitted to give evidence of things done at a former trial, without the proceedings thereat be proved. 12 Mod. 555. Trin. 13 W. 3. Anon.

[T. b. 117] Tithes discharged.

1. To prove a discharge of tithes by unity of possession in the time of the abbot, and at the time of the Diffolution two persons testified that they had feen a deed of appropriation of the parsonage to the abbot, for which reason they verily thought there was a unity of possession at the time of the Dissolution. But it was ruled to be no proof, for it may be intended not to continue, and a confultation was granted. But they faid, that hearfay shall be allowed for a proof. Cro. E. 228. Stransham v. Cullington.

2. On the 2 E. 6. to prove a discharge of tithes by unity, precise proof need not be made; but it is sufficient to swear that since the 31 H. 8. it has been always reputed to be discharged by unity; or that he had commonly heard it to be fo, or the like. 2 Roll.

R. 125. Mich. 17 Jac. B. R. Congley v. Hall.

3. And in cases of tithe to support their payment evidence is allowed more extensively than in any other case. A paper 1639. figned, &c. to prove a composition for rabbets on Brampton Burroughs by the predecessor of the present vicar, &c. was read by the Barons (Page hæsitante) though no direct proof that the defendant claimed under the person that figned it the Warren (that is, Burroughs), &c. it appearing that it was of an antient date, that the estates mentioned in it were as defendant now had, and there being proof of the hand-writing of one of the witnesses, &c. But afterwards held that it was not sufficient to fupport plaintiff's demand for the uncertainty, as that there might be a warren at another place, or a piece of ground fo called, or the composition might be for other tithes arising out of the warren. Hill. Vac. 1718. Gregory v. Lutterel. Books of accounts, memorandums, &c. of a preceding vicar may be made use of as evidence for a successor to support his demands in

So of a modus. 2 Roll. R. 434. Trin. 21 Jac. B. R. Paget's Cafe.

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1191 ane case of tithes, &c. Per Bury Ch. B. and Baron Price in my Lord Arundel's Case, Wiltshire (E. R.) and per Cur. in Shobrook's Cause.

4. Every composition is an evidence of the right and duty of tithes for which the composition is made, yet in the Bishop of Exeter's Case it was held that a general composition may include a modus as well as tithe in kind where the moduses were for several matters, for some years they may be more, in some years less, and so may be compounded for; and though this composition continues 40 years yet the modus shall continue. Hill. 6 Geo. in the Exchequer.

5. In suit for tithes the defendant may prove that the plaintist got his living by simony, or did not read the thirty-nine articles, &c. or is guilty of some act or omission which makes his benefice void, or he may prove a lease or grant of the tithes, or some agreement of composition, or a modus decimandi, or that the benefice is above 8 l. value per ann. and that the plaintist has accepted another living without a dispensation, &c. L. E. 129. pl. 100. cites Law of Tithes, 424, 5.

#### [T. b. 118] Trees.

[ 256 ]

1. It was ruled by Holt Ch. J. at Lent Assises at Winchester upon a trial at Nisi Prius 1697-8. 1. That if A. plants a tree upon the extremest limits of his land, and the tree growing extends its root into the land of B. next adjoining, A. and B. are tenants in common of this tree. But if all the root grows into the land of A. though the boughs overshadow the land of B. yet the branches follow the root, and the property of the whole is in A.

2. Two tenants in common of a tree, and one cuts the whole tree; though the other cannot have an action for the tree, yet he may have an action for the special damage by this cutting; as where one tenant in common destroys the whole slight of pidgeons. Ld. Raym. Rep. 737, 738. Waterman v. Soper.

3. A demised ground to B. which was pasture, except the trees; B. put in his cattle to feed, which barked the trees. A cannot have trespass against B. Ruled by Holt Ch. J. upon a point made and referred to him at the assists at Bury in Lent 12 W. 3. upon hearing of counsel several times, though at first he was of a contrary opinion. Ld. Raym. Rep. 739. Glenham v. Hanby.

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## [T. b. 119] Trover.

1. If A. takes goods and then B. takes them from A. trover lies either against A. or B. Sid. 438. pl. 3. Hill. 21 & 22 Car. 2. B. R. Wilbraham v. Snow.

2. In an action of trover and conversion, and nothing proved but a tortious taking of the cattle by way of trespass, and driving them away, and it was ruled a good ground for this present action, and a conversion shall be intended, otherwise when he comes to Vol. XII.

them by trover, there an actual conversion shall be proved. Clayt. 112 pl. 191. March. 24 Car. 2. Beckwith v. Elsey.

3. On trover in England, a conversion may be given in evidence

in Ireland. 1 Salk. 290. Brown v. Hedges.

4. In trover, though the thing be redelivered, yet there is a converfion, but the redelivery may be given in mitigation of damages.

2 Lill Regr. 384.

5. Upon an action of trover brought against one for converting a gold ring of the plaintiff's to his the defendant use, to which not guilty is pleaded, it will be good evidence to prove the conversion, that the plaintiff demanded the ring, and that the defendant

refused or denied to deliver it. Brown's Anal. 14.

6. In trover on not guilty pleaded, it appeared in evidence, that the defendant was tenant by the curtefy of lands in Ireland, and had cut down and fold the trees from off the estate, and that the reversion belonged to the plaintiff and two others in coparcenary; and upon a case made for the opinion of the Court, it was resolved in B. R. 7 Annæ, that in local actions, as in trespass quare clausum fregit, the plaintiff cannot prove a trespass but where he lays it, nor lay it in any other place than where it is. But it is otherwise in actions transitory, as trover; ergo in this case he may lay the conversion here, and prove it to be in Ireland. L. E. 145. pl. 7.

[ 257 ]

[T. b. 120] Truft.

1. Copyhold for three lives was granted to baron and feme and J. S. for their feveral lives successive, and by the copy it appeared that the fine paid was the money of the baron and seme. Ld. C. Macclesfield decreed, that J. S. is in equity to be intended but as a trustee for the baron and seme and the survivor of them, and that it being mentioned in the copy that the fine was paid by them is strong evidence of its being so, which though the Court will not look upon as conclusive, yet any evidence to contradict it ought to be very clear and full in order to prevail. Wms's Rep. 781. Hill. 1721. Benger v. Drew.

## [T. b. 121] Vexatious Profecution.

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1. Case was brought for maliciously holding to special bail withRep. 503,
504. C. S.
and S. P. to be good evidence. 12 Mod. 273. Hill. 11 W. 3. Robins v.
1 Salk. 15. Robins.
pl. 6. S. C.

2. A non prof. in a former fuit is evidence of a vexatious profecution. 12 Mod. 501. Pasch. 13 W. 3. Anon.

# [T. b. 122] Unity of Possession.

1. On a prohibition for tythes unity of possession in the time of the abbot at the time of the Dissolution was surmised, and proved

proved it by the testimony of one H. and another who said they had feen a aeed of appropriation of the parsonage to the abbot, for which they verily thought that there was an unity of possession at the time of the Dissolution; and this was ruled no proof, for it may be intended not to continue, and a confultation was granted, but they faid bearfay shall be allowed for a proof. Cro. E. 228. pl. 17. Pafch. 33 Eliz. B. R. Strantham v. Cullington.

# [T. b. 123] Usage of Granting Offices by Spiritual Persons.

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1. On question whether an office had been usually granted in Jo. 210. pl. reversion, or the like by a bishop which depends upon the usage, accordingly. the evidence was, the plaintiff shewed a grant of 4 E. 6. to one in reversion, and confirmed I Eliz. and that 7 Eliz. the reversioner surrendered and took a new grant to him and another; per Cur. this is a good inducement to believe that the office was anciently fo granted in reversion, but being matter of fact it was left to the jury, and they found for the plaintiff. Cro. C. 279. pl. 19. Mich. 8 Car. B. R. Young v. Stowell.

2. In an indebitatus assumptit brought for the profits of the Carth. 213. office of Chancellor to the Bishop of Landass, which was granted S. C. and to two to hold conjunctim and divisim, and to the survivor of the grant to them according to ancient custom, one of them died, and the Bishop two adjudgconstituted another against whom the action was brought by the ed good. \_\_\_\_\_ furvivor; it was held, that the sheaving that such or the like grants S. C. held, were made fince I Eliz. is evidence, that fuch were also made be- that such offore the statute. 4 Mod. 16, 17. Pasch. 3 W. & M. in B. R. fice may be granted to Jones v. Beau.

Show. 228. S. C. adjudged .---

# [T. b. 124] Ufury.

[ 258 ]

1. The statute of usury mentions three things, viz. Loans, Bargains, and Chevifance. An information was brought upon the statute for an usurious loan of money, and the informer gave evidence an usurious contract upon a bargain for wares; this does not maintain the information, but if the information had been general upon an usurious agreement and given a loan in evidence, in fuch case it had been good enough, because every loan is an agreement. Le. 95. pl. 125. Mich. 29 Eliz. in Scacc. Sir Walstan Dixey's Case.

2. In the case of one Dalton. Where in debt upon an obligation where the statute of usury was pleaded, it was faid by Popham, If a man lend 100 l. for a year, to have 10 l. for the use of it. If the obligor pays the 10 l. twenty days before it be due, that does not make the obligation void, because it was not corrupt; but if upon making the obligation it had been agreed, that the 10 l. should have been paid within the time, that should have been usury; because he had not the 100 l. for the whole year, when the 10 l. was paid within the year; and verdict was given accordingly. Noy. 171. Anon.

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3. In an action for debt upon a bond, the defendant after over pleads the statute of usury, and that it was upon an usurious contract &c. upon evidence it appeared, that the wife of the plaintiss used to lend money to be paid by the week, and that she lent to the defendant 20 l. to be paid by 20 s. by the week, &c. and 1 s. and 6 d. by the week for interest, and that the defendant paid the interest which amounted to 30 s. when the money was lent, and that the wife exacted and received it; and upon this evidence, Holt Ch. J. ruled it to be an usurious contract by the husband sufficient to discharge and avoid the obligation civiliter, though not sufficient to charge the husband criminaliter; and it was found for the defendant. Skin. 348. pl. 17. 5 W. & M. in B. R. Barnett and Tompkyns.

4. Upon an usurious contract pleaded, the proof lies all upon defendant; for by his plea he confessed the debt; per Holt Ch. J. 12 Mod. 517. Pasch. 13 W. 3. Anon.

## [T. b. 125] Way.

1. In the case of a way, you must prove the locus a quo & ad quem, and over what land; per Richardson Ch. J. Litt. R. 295. 5 Car. C. B.

2. In trefpass the evidence for the defendant was, that he had a barn, and purchased a way over the plaintiff's land to that barn, and afterwards he bought other lands lying contiguous to that barn on the one side, and to a haven on the other side, and carried carriages by that way to the barn, and through it over his own new purchased land to the haven. And by Hale Ch. B. if Ipurchase a general way to such a place, I may go from thence on my own ground which way I please, though I purchase the ground after the way purchased. Trials per Pais, 7th Edit. 433. cites Summer Assis, Norfolk 1665. Heynsworth v. Bird.

# [T. b. 126] Will.

1. Probation of a testament before the commissary suffices; which the justices agreed. Br. Certificate de Evesque, pl. 30. cites 7 E. 4. 14.

2. Probate of a will of lands is no evidence, but the will itself must be produced. Arg. 2 Chan. Cases, 202. Mich. 26 Car. 2. Rothwell v. Hussey.

will itself.

Cumb. 395. Per Holt Ch. J. Pulleston v. Warburton. Mich. 8 W. 3. B. R. But where the will is not of lands so that the Spiritual Court has jurisdiction of the cause, the probate is an undeniable evidence, which shall conclude all others from saying the contrary. 12 Mod. 136.

King v. Raines.

3. If a will contain lands to the value of 100,000 l. yet the Ecclefiaftical Court may cite them to bring in the original to be proved per testes, and this Court ought not to prohibit them; but if they will not after proof deliver back the original, then this

Court will intermeddle, and a proof of the will cannot be by copy; for if the original be burnt or lost, &c. a copy of their registry hath been often given in evidence, but a copy of a copy cannot. Per Jefferies Ch. J. Skin. 174. pl. 3. Pasch. 36 Car. 2. B. R. Anon.

4. Will exemplified under the Great Seal is not evidence to a jury in ejectment. Cumb. 46. Pasch. 3 Jac. 2. B. R. Anon.

5. Two feveral wills may be made of feveral particular things, Parl. Cafes, and one shall not revoke the other. Arg. agreed by both sides. Show. 553. Mich. 4 Jac. 2. in Cafe of Hitchins v. Baffet.

gerford v. Nofworthy. S. C. and P.

-Hard. 375, 376. Mich. 16 Car. in Scace. Seymour v. Nofworthy S. P. 3 Mod. 208. S. C. & S. P. agreed .- 2 Salk. 592. pl. 1. S. C. held accordingly, and judgment affirmed in Dom. Proc. -

6. After testator's death one sheet was found in one house and a second sheet in another house, yet adjudged a good will. Cited per Dolben J. Cumb. 174. Mich. 1 W. & M. in B. R. cites it as the E. of Effex's Cafe.—Show. 69. S. C. and S. P.

7. At a trial at bar it was ruled per Holt Ch. J. that if there are three fubscribing witnesses, this is sufficient within the statute of frauds and perjuries, though upon trial one of them would not favear that he faw the testator seal and publish his will; for otherwife it would be in the power of a third person to defeat the will of the deceased; and therefore if it be proved to be his hand, and that he fet it as a witness to the will, it is sufficient to satisfy the statute. Skin. 413. pl. 9. Hill. 5 W. & M. in B. R.

Sir Marmaduke Dayrell v. Glascock.

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8. At a trial in ejectment, Summer Assises 10 Will. 3. 1698. at Canterbury in Kent, upon the evidence it appeared, that a will was made by William Horne in 1647 of the lands in question, which will was loft, but mention was made of it in the kalendar (which is the index of the register of the Spiritual Court) and also in the feal book. A commission issued in April 1648 to examine the executors upon their oaths, &cc. and that being returned, probate was granted the 11th of May 1648, which probate was produced in evidence. And Holt Ch. J. allowed it to be good proof of the will, but he referved it for his further confideration, and afterwards the parties agreed. But Holt Ch. J. afterwards, as well in B. R. as at Nisi Prius, upon other trials declared, that he held it to be good evidence, and that he continued of his former opinion; and he then faid, that without doubt the register's book is good evidence to prove a will. Ld. Raym. Rep. 731. St. Leger v. Adams.

9. Copy of a register is not evidence to prove a will. Per Holt Ch. J. admitted at Maidstone Assises in Lent 1701. Ld. Raym.

Rep. 744. in Cafe of Dike v. Polhill.

10. Book for registering wills with the probate, and possession accordingly, is good evidence of a will for land. Per Ward Ch. B. Devon Sum. Assises 1705. 4 Ann. For Hale Ch. J. allowed the probate, and constant possession in like case.

11. On a trial at bar the question was, whether there was a X 3

will or no will? The plaintiff produced a deed indented made between two parties the man and his fon; and the father did agree to give the fon fo much, and the fon did agree to pay fuch and fuch debts and fums of money; and there were fome particular expressions refembling the form of a \* will, as that he was sick of body, and did give all his goods and chattles, &c. But the writing was both fealed and delivered as a deed, and they gave evidence that he intended it for his last will, which the Court said was a good proof of his will. L. E. 93. pl. 18.

12. In the Case of Rice and Oatsield B. R. 11 & 12 Geo. 2. it was said, that where all three witnesses to a will denied their own hands, that other evidence were admitted to prove their hands, and that they saw the will executed, and the witnesses sign their hands, and held good, and verdict thereupon. Pike v. Dadmarine.

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13. A bill to establish a will for land, and no notice was taken of the third witness whether dead or not, but if living he ought to have been examined also, sed non allocatur, because this would have been good evidence at law, the other witnesses proving that they saw the other witness subscribe his name as a witness; it is common practice at law, and why not good in equity? King Chanc. Mich. Vac. 1725.

## [T. b. 127] Witness interested.

1. The law gives the party tried his election to prove a perfon offered as evidence, interested two ways; viz. either by bringing other evidence to prove it, or else by fivearing the person himself on a voyer dire. But though he may do either he cannot have recourse to both. Per Parker Ch. J. 10 Mod. 193 Mich. 12 Ann. B. R. Q. v. Muscot.

# (U. b. 1) Evidence. Demurrer to it.

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Br. General 2. Upon a matter in law the other party may demur in law, Iffue, pl. 51. for it belongs not to the lay-jury to judge thereof; but that, it feems, ought to be fuch a matter that the judge may take to be doubtful. Heath's Max. 95. cites 9 H. 6. 33.

Heath's

3. Where the iffue is upon prescription, if the plaintiff give in evidence a deed within time of mind, the defendant may demur upOtherwise on the evidence. Br. General Issue, pl. 55. cites 34 H. 6. 36.

be time out of mind, for such a deed, although it were the King's patent, cannot be pleaded. Heath's Max. 83. cites 12 H. 4. 24.

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4. In debt against an executor the defendant did plead plene administravit, and gave in evidence a redemption of a pledge with his own money, upon which the plaintiff did demur, and by affent of both parties the jury was discharged, quod nota. Heath's Max. 96. cites 6 H. 8. 2. Dyer.

5. And fo feems experience at this day, that in demurrer on evidence the confent of both parties is requisite. Heath's Max.

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6. The plaintiff in annuity by prescription shewed a deed in evidence within time of mind; and the defendant prayed, that the evidence might be entered, and he would demur upon the fame, [ 261 ] and the plaintiff would not agree to it, quod nota. But if the Court think the evidence good, the other fide may defire the justices to feal a bill of exception, which in the writ of error he may alledge, and not in arrest of judgment, ex rigore juris. Heath's Max. 95, 96. cites 34 H. 6. 36. and Tatam's Action

upon the Case, 27 H. 8.

7. In debt upon a bond of 40 l. for the payment of 20 l. at a day and place certain. The defendant pleaded that he had paid the faid 20% according to the condition upon which they were at iffue; and at the nifi prius the defendant gave in evidence that he had paid the money to the plaintiff before the day, and that the plaintiff had accepted of it; all which matter the jury found specially, and referred the fame to the justices. And it was faid by the whole Court, that the payment before the day was a fufficient difcharge of the bond; but because the defendant had not pleaded the fame specially, but generally, that he had paid the money according to the condition, the opinion was that they must find against the defendant, for that the special matter would not prove the issue. And the Lord Dyer Ch. J. said, that the plaintist's counfel might have demurred upon the evidence. Godb. 10. pl. 14. Mich. 24 Eliz. C. B. Anon.

8. If a plaintiff in evidence shews any matter in writing, or of Cro. E.741. record, or any fentence in the Ecclefiaftical Court, and the defendant fl. 9. Mid-offers to demur thereto, the Minister of the defendant of th offers to demur thereto, the plaintiff may not refuse to join in de- ker. S. C. murrer, but he must do it, or wave his evidence. So if the plain- and S. P. tiff produce witnesses to prove any matter in fact upon which a question pertot. Cur. in law arises, if the defendant admits their testimony to be true, he may But in this demur upon it, for matter of law shall never be put in the mouth latter case of lay gents; fo may the plaintiff demur upon evidence of de-bywitners, fendant, mutatis mutandis. 5 Rep. 104. 2. Trin. 42 Eliz. B. R. theother, un-

Baker's Cafe.

not be compelled to join, because the testimony is to be examined by a jury, and the evidence is certain, and may be enforced more or less, but both parties may agree to join in demutrer upon such evidence.

9. The jury may upon their own knowledge give a verdict without evidence. In no case may one demur upon evidence, unleis he will admit the evidence to be true. Nor without the confent of the other party (as it feems) who according to the opinion of many may put himself upon the jury to find a verdict, which they

may do either generally or specially at their pleasure; which if they do specially, they avoid all occasions of attaint. Heath's Max. 95. cites Fogassa's Case in which there was but one witness.

10. And so in the Case of Fogassa, the King's Attorney did demur upon the evidence, and that (as it there appears) whether the other would agree or not. But whether fo in Newse and Scholastica's Case. Quære Heath's Max. 95.

11. Demurrer upon evidence cannot be for a thing that the jury may know of their own conusance. 1 Lev. 87. Mich. 14

Car. 2. B. R. Fitzharris v. Bojun.

12. Where a judge admits that for evidence which is not, there the party must not demur; for if he does, he admits the evidence to be good, but denies the effects of it, and therefore in fuch case he must bring his bill of exceptions; and so it is if the judge will not admit that for evidence which is evidence; per Holt Ch. J. 3 Salk. 155. pl. 10. Mich. 12 W. 3. Thurston v. Slatford.

13. The judges of the Court cannot try a matter of fact in queltion, upon a demurrer to an evidence, and therefore the plaintiff and defendant must agree upon it, and confess it. Trin. 23 262 | Car. B. R. for else the Court will not proceed to deliver their opinons touching the matter in law demurred upon, because if the matter of fact be not agreed, there can be no judgment given in the cause, which way soever the matter in law fall out to be. L P. R. 550.

> 14. Demurrer to evidence need not be drawn up in form immediately, but the fubstance must be reduced into writing while the thing is transacting, because it is to become a record; per Holt Ch. J. 1 Salk. 288, 289. in pl. 26. Pasch. 7 Ann. B. R. in Case of Wright v. Sharp.

> 15. Wherefoever the evidence does not warrant, prove and maintain the very fame thing that is in iffue, that evidence is defective, and may be demurred upon. Trial per Pais, 7th Edit. 467. lays it

down as a rule.

16. On a demurrer it is the fettled rule of the Court, that they cannot move for injunction for this reason; till the demurrer is argued it is not certain that the cause is in Court. Sel. Cases in Canc. in Ld. King's time, Trin. 11 Geo. 1. in Case of the Duke of Chandois v. Talbot.

# (W. b) Bills of Exceptions.

1. 13 E. 1. Westm. 2. ENACTS that when any that is impleaded

the making of this act, a man might have had a writ of error for an error in law, either in redditione judicii, in redditione executionis, or in processu, &c. And this error in law must be apparent in the record, &c. for the writ of error fays, Quia in recordo & proceffu, &c. error intervenit manifestus, &c. Or for error in fait, by alledging matter out of the record, as death of either party, &c. before judgment; now the mischief before this statute was, that when the demandant or plaintiss, or the tenant or defendant did offer to alledge any exception (as in those days they did ore tenus at the bar) praying the justices to allow it, and the justices overruling it so as it was never entered of record, this

At common law before

the party could not affign for error, because it neither appeared within the record, nor was any error in fait , but in law; and so the party grieved was without remedy, for whose relief this statute was made.

2 Init. 426, 427.

This act does extend as well to the demandant or plaintiff as to the tenant or defendant in all actions real, personal and mixt; regularly it extends not to a stranger to the record, which is not to come in lieu of the tenant, &c. For example, if the bailiff of a franchife demand conusance, and the justices overrule the same, he cannot pray the justices to inseal a bill, because he is no party to the record; but yet one that offered to be received, and is denied, albeit he be none of the parties to the writ, yet because he is privy in estate, and to be in loco tenentis, he shall have the benefit of this act, and so it is of the vouchee, though he be no party to the writ, because he is in loco tenentis. 2 Inft. 427.

#### 2. before any of the justices

Albeit the letter of this

branch feemeth to extend to the justices of C. B. only by reason of these words, et si force ad querimoniam de facto justic' venire facias Dominus Rex recordum coram eo (which is by writ of error into B. R.) yet that is put but for an example, and this act extends not only to all other Courts of record (for upon judgment given in them a writ of error lies in B. R.) but to the county-court, the hundred and court baron, for thereis the judges were more likely to err; and albeit, of judgments given in them a writ of error lies not, but a writ of falle judgment in the Court of C. B. yet the cafe being in the same or greater mischief, the purview of this statute does extend to those inferior Courts. 2 Init. 427 .- Agreed that a bill of exceptions lies on a trial in B. R. by Westm. 2. cap. 31. 2 Show. 147. pl. 127. Mich, 32 Car. 2. B. R. in Cafe of the City of London v. the Unfree Merchants .-Resolved per Cur. that a bill of exceptions lies not in this Court upon a trial at the bar; for the words are, that he shall have remedy coram Domino Rege, which extends not to themselves to overrule their own judgments, and therefore extends only to Nisi Prius and inferior Courts; it is true that in the case of ENFIELD. V. HILL in this Court on a trial at the bar in a Canterbury cause upon a mandamus, there was one fealed, but at the trial there were only two judges prefent, viz. Rainsford and Jones, but Jones doubted, although if they determined the matter then they could not proceed, he therefore did fubmit to the Lord Ch. J. and afterwards it was fo ftrongly doubted that they never proceeded to any determination to this day. 2 Show. 278, 288. pl. 286. Pafch. 35 Car. 2. B. R. The King v. Smith .-

3. doth alledge an exception, praying that the justices will allow it, [ 263 ] which if they will not allow, not only to

all pleas dilatory and peremptory, &c. and (as has been faid) to prayers to be received, over of any record or deed, and the like, but also to all the challenges of any jurors, and any material evidence given to any jury, which by the Court is over-ruled. 2 Inft. 427.

Here is an 4. if he that alledged the exception do write the fame exception, express commandment given to the juffices; and yet if one refuse, and any of the other inseal the bill it sufficeth, but if they all refuse it is a contempt in them all; for it lies not in the power of the justices that denied to perform the purview of this act to take advantage of their own wrong, and the party grieved may have a writ grounded upon this statute to the justices commanding them to put their seals juxta formam statuti, & hoc sub periculo quod incumbit nullatenus omittatis. 2 Inst. 427.

5. and require that the justices will put to their seals for a witness, Albeit the the justices shall so do; and if one will not another of the company ed be dead, yet his heirs or executors,

&c. according to the case, shall have a writ of error upon this bill of exception. 2 Inst. 427.

6. S. 2. And if the King upon complaint made of the justices, Albeit some cause the record to come before him, and the same exception be not found that the jusin the roll, and the plaintiff shew the exception written, with the seal tices may of a justice put to, the justice shall be commanded that he appear of a bring in the certain day, either to confess or deny his seal.

their feal, and acknow-

ledge it, yet the furer way is to follow the order preferibed by the act. 2 Int. 427, 428.

Onthe other judge deny hisieal, then difallowed.

7. S. 2. And if the justice cannot deny his seal they shall proceed to judgment according to the same exception, as it ought to be allowed or

may the plaintiff in the writ of error take iffue thereupon, and prove it by witnesses, for it lieth not in the judge in this case to frustrate this excellent law made for advancement of justice and right. 2 Intt.

> 8. In affise the array was challenged, because the plaintiff was Sheriff of fee of the same county, scil. the Lord Clifford Sheriff of Westmerland, and R. is his under-sheriff and of his fee and robes, and by R. was the pannel arrayed, and the country fummoned, to which it was faid, that R. was theriff and fworn to the King as theriff, and amerced as sheriff, by which the justices took the assife, wherefore upon bill thereof affigned it was afterwards reverfed by error for this challenge quod nota, and therefore the first matter is a good principal challenge. It feems, that it had not been reverfed if the bill affigned had not been, because it is matter in fact. Br. Challenge, pl. 97. cites 9 Aff. 8.

In an affife, er evidence a bill of exeeptions is made according to West. 2. chap. 31. but it is not entered of plaintiff has is brought bill ; the de- 52.65. 92. fendant in the writ of error who

9. In affife the defendant faid, that the fberiff was beyond fea, and upon a plea had no under-fleriff nor other minister to serve the process, and the not allowed justices would not enquire of it, nor make an examination of him who bythejudges, put in the return; but the plaintiff faid, that he was examined, &c. but the jultices awarded the defendant to answer, and the defendant of this took bill of exception of two justices, which was brought into B. R. by the hands of the one only, and without fei. fa. or day in Court, and therefore process was made after against the justices ad cognoscend' figilla fua, who came in and acknowledged their feal, by which it was awarded, that the delirecord; the very in of the bill by one justice or both after acknowledging their judgment, a feal is good, and the party was warned by fci. fa. ad audiendung writ of error errores before that the bill was put in, by which the defendant faid, that he ought to be warned de novo, & non allocatur; for the bill upon this is parcel of the record ab initio. Br. Error, pl. 50. cites 11 H. 4.

> 10. And after the plaintiff, to be fure, fued another sci. fa. against the defendant ad audiendum errores, and after it was adjudged, that this last sci. fa. was not good, to which the justices of C. B. agreed. Ibid.

and the plaintiff in the writ of error both confess, that this is the bill that was fealed. This is sufficient without awarding a scire facias to the judges according to the said statute ad cognoscendum vel dedicendum factum, for this would be in vain. Jenk. 78. pl. 52.

Br. Error, pl. 50. cites 21 H. 4. 52.

was the

plaintiff in the affife,

> 11. And bill of exceptions shall remain with the party, therefore it is not of record till the justices have certified it, and acknowledged their feal. Ibid.

Note, Error cipal judgment fhall reserie the

12. If a man pleads in any action, and the justices will not alin the prin- low thereof, and the party makes his bill upon it, and prays that the justices will seal this his bill of exceptions or plea, and if they do not according as is contained in the statute of Westm. 2. cap. 3.

the party grieved shall have a writ of error, and may affign accessory & error upon that bill fealed, and also in the record or in one of a judgment them at his pleafure. But this bill ought to be fealed by the juffices be against a before judgment given by them, and not after. F. N. B. 21. (N) parfon in ancites-11 H. 4. 52. 65. 92.

against the successor he shall not plead in bar of execution, that the judgment was erroneous, and if he does fo, execution shall be awarded; and if he after brings error on the judgment. if on the scire facias he affigns error on the principal judgment this is not good, although the whole record of the judgment be received in the fci. fa. And therefore if the judgment be affirmed on the soi. fa. yet he may have error on the principal, and thereby reverse the judgment on the sci. fa. and he shall be restored to all that he lost on the sci. fa. F. N. B. 21. (N) in the new notes there cites it adjudged 11 H. 4. and Ibid. cites 9 H. 6. 15. accordingly. - Ibid. in the notes there (d) cites 11 H. 4. 52. per Hul. that the bill of exceptions is no part of the record before that it be acknowledged (viz. entred.) 21 H. 4. 65. By good opinion one of the justices may deliver the bill into Court without a fei. fa. yet in that case a sei, fa. issued, and the justices came and acknowledged their feal, and it was held, that this acknowledgment of the justices might be long time after the writ of error brought and after the sci. fa. awarded, and that no new sci. fa. thall iffue; for it is now become parcel of the re! cord ab initio as in the case of diminution alledged after a sci. fa. the defendant shall not alledge diminution in the bill of exceptions, but ought to have thewn his case when the justices came to see their seals; and says see 2 H. 4. 92. — Br. Error, pl. 52 S. C. — See also 11 H. 4. 67. and note that 11 H. 4. 32. per Gascoign and Hulf. it was held clearly that the bill may be sealed after the record removed by writ of error.—

13. In cui in vita, the writ was abated inafmuch as the demandant in the writ did not make mention of whose demise he claimed, where the tenant had had the view twice before, and therefore the tenant was ousted of the view, but it was agreed, that if he was grieved in this case, that he might have bill scaled of all this matter to have thereof writ of error. Br. View, pl. 103. cites

14. Where the evidence is not good in maintenance of an iffue, or where the parties vary in the law upon a challenge or the like, by which the party takes bill of exceptions fealed by the justices by the statute of Westm. 2. which wills that this shall be used in writ of error, and scire facias to confess or deny his seal, but shall not alledge it in arrest of judgment, quod nota. Br. Repleader, pl. 1. cites 27 H. 8.

15. If there be a thing given in evidence which ought not, the Court above cannot remedy it, except it be returned with the

poslea. Brownl. 207. Pasch. 5 Jac. Hall v. White.

16. If one offers to demur upon evidence, and is overruled, and [ 265 ] after judgment a writ of error is brought, this cannot be affigned a trial does for error; but it is a proper case for a bill of exceptions, and the re- erroncoutmedy which the ftatute in that case appoints. Adjudged Cro. ly over-rule C. 341. Hill. 9 Car. Cart.v. St. Davids Bishop.

a matter offered in evi-

regular way is to tender a bill of exceptions; yet if upon fuch a matter the party will not fuffer the trial to go on against him it is good cause of a new trial; per Cur. 7 Mod. 53. Mich. 1 Ann. B. R. Watts v. Roswell.

17. The flatute of Westm. 2. cap. 31. which gives bill of ex- Lev. 65. ceptions does not extend to any case where prisoners are indicted accordingly. at the fuit of the King; for the statute intends to remedy the overruling of evidence in civil pleas between party and party only. cited Raym.

Sid. 85.

Sid. 85. pl. 13. Trin. 14 Car. 2. B. R. the third Resolution in 34 & 35. Car. 2. B. R. the Case of the King v. Sr. H. Vane and Lambert.

in a nota there. - Keb. 324. pl. 52. S. C. held accordingly. - Kel. 15. S. C. held accordingly. Goldib. 137. pl. 39. Hill. 45 Eliz. Blunt's Cafe. S. P. held accordingly.—S. P. 8 Mod. 206. Arg. in the Cafe of the King v. Brecknock Corporation.—2 Hawk. Pl. C. S. P. and cites S. C. and State Trials, vol. 1. fol. 918.——Raym. 486. S. C. cited as refolved.

a Jo. 146. Philips v. Chichester, Fernes; to which the other party fhewed in evidence letters of ad-

18. Bills of exceptions for that the judges of B. R. in Ireland would not direct the jury, that the probate of a will before the and menti- Archbishop of Canterbury (the testator dying in his province) ens also pro- was conclusive evidence, but only told the jury that it was good the bishop of evidence, and so left it to the jury; and per Cur. the bill of exceptions lies not, for though the evidence be conclusive, yet the jury may hazard an attaint if they will, and the proper way had been for the defendants to have demurred upon the plaintiffs evidence. Raym. 405 Mich. 32 Car. 2. B. R. Chichefter v. Philips.

ministration of goods under the seal of the Primate of Ireland. The title was, for a lease for years in Ireland claimed by the leffor of the plaintiff under the faid administration, and upon the first opening of the cause, judgment was affirmed .-

> 19. A bill of exceptions will lie at a trial at bar as well as at the nifi prius; for the words of the statute are "that the justices " shall fign it," which word justices being in the plural number cannot be well understood of any other justices than those of the Courts at Westminster; held per Cur. 3 Salk. 155. pl. 10.

Mich. 12 W. 3. Thurston v. Stratford.

20. Evidence was offered at the affises and refused, but no bill of exceptions was then tendered, nor were the exceptions reduced to writing; fo that the trial went on, and a verdict was given for the plaintiff; then next term the Court was moved for a bill of exceptions; Holt Ch. J. You should have infifted on your exception at the trial, if you acquiefce you wave it, and shall not refort back to your exception after a verdict against you, for perhaps if you had stood upon it, the party had other evidence, and would not have put the cause on this point; indeed the statute appoints no time, but the reason of the thing requires that the exception should be reduced to writing when taken and difallowed, like a special verdict or demurrer to evidence, and though it need not be drawn up in form, the substance must be taken in writing while the thing is transacted, because it is become a record; and so the motion was denied. Holt's Rep. 301. pl. 34. Pasch. 7 Ann. Wright v. Sharpe.

# 1 266 7

# (X. b.) Issues out of Chancery.

SCIRE Facias upon a recognizance in the Chancery brought in the Chancery, the defendant pleaded release, the plaintiff denied it, and fo to iffue, and the record and all the action and pro-

cefs was fent into B. R. to be tried, and there the plaintiff was nonfuited, and brought a new feire facias there, and well; for there was the record after the fending it out of Chancery, contra, if the Chancery had fent only the tenor of the record; note the diversity. And it is said elsewhere, that the Chancery shall make the venire facias, and award it to the sheriff returnable in B. R. scil. coram nobis ubicunque tunc fuerimus in Anglia; for all is the King's jurisdiction. Br. Jurisdiction, pl. 41. cites 24 E. 3. 45.

2. Upon issue joined in Chancery, venire facias shall issue re- S. P. Br. Juturnable in B. R. and there the record shall be fent; for the Chancery cannot try by jury. Br. Process, pl. 154. cites 13 E. 4. 8.

3. If upon traverse of office in Chancery they are at iffue, the venire facias shall issue from Chancery returnable in B. R. and therefore the Chancery shall not award sicut alias; for they cannot record that the sheriff did not send the writ; for the return is not to be in this Court, and therefore the alias shall be in B. R. Br. Ven. Fac. pl. 29. cites 13 E. 4. 8.

4. Whether a person, to whom another had got administration, was dead or not? Chan. Cases, 50. P. 16 Car. 2. Scot v.

Rayner.—N. Ch. R. 93. S. C.

5. Whether the primary intention in felling timber was to do waste or not? Chan. Cases, 96. 19 Car. 2. Thomas v. Porter and the

Bishop of Winchester.

6. Vendor covenanted against incumbrances, and an iffue was directed whether the purchasor had notice of a L. for a year. 3 Ch. R. 24. 20 Car. 2. Savage v. Whitebread. So of a rentcharge. N. Ch. Rep. 118. Harding v. Nelthorp.

7. Land being charged with a rent and no fufficient diffrefs being found, which being complained of by bill, and the plaintiff feeking to charge the person, it was referred to a trial at law if there was any fraud to hinder the plaintiff of his distress. Ch. Cases,

147. Mich. 21 Car. 2. Davy v. Davy.

8. After a decree had been enrolled 31 years, a trial was directed on this issue, whether a defendant was dead before the decree which was enrolled 31 years before? 3 Ch. R. 49. 22 Car. 2. Yeavely v. Yeavely.

9. Whether a judgment was fatisfied? Finch's Rep. 3. Mich.

25 Car. 2. Bryan v. Kent & al.

10. Whether a bond was discharged in testator's lifetime, or how much money was paid thereon? Finch. R. 33. Mich. 25 Car. 2. Braithwait v. Davis.

11. Trial at law directed to prove a former grant. Fin. R. 41. Mich. 25 Car. 2. Pit v. Corbet, Thornborough, & al.

12. Quantum damnificatus? Bond for fidelity of apprentice.

Fin. R. Hill. 25 Car. 2. Trift v. Buckeridge.

13. A trial at law is directed for the plaintiff to try his right to a reversion of lands, after the death of the defendant Wainwright, fo the plaintiff defires he may try the same when he shall think fit; but the defendant infifts, that the plaintiff ought to be confined to a convenient time, which was prayed might be the rule in this cafe,

24 E. 3.45-

and that the defendant might not be kept in suspence, and to wait on the plaintiff's convenience, when he shall think fit to try the same. This Court ordered it to be tried in Easter term next, or the issue to be taken pro confesso. 2 Chan. Rep. 124, 125. 29 Car. 2. so. 102. Oliver v. Leman & al.

14. Whether the plaintiff was born in lawful wedlock? Fin. R. 325. Mich. 29 Car. 2. Devereux v. Devereux and Thel-

well.

15. If a will be re-published or not? 2 Ch. R. 30 Car. 2. Cotton v. Cotton.

16. To afcertain damages occasioned by deviation in a voyage. Vern. 21. Mich. 1681. Newland v. Horseman.

17. If the lord of a manor had the grant of a free warren, and if he had, then if there was sufficient common left for the tenants? Vern. 22. Mich. 1681. How v. the Tenants of Bromsgrove.

18. Compos, or non compos was directed forty years after the death of teltator, of which eighteen were in the infancy of the

heir. Vern. 195. Mich. 1683. Lyford v. Coward.

in the infancy of the heir? 2 Ch. Cases, 150. Mich. 35 Car. 2.

Lyford v. Coward .- Vern. 195. S C.

20. Whether J. S. who had committed a forfeiture for treason in the Irish rebellion, and J. S. who was cestui que trust of lands was the same person? Vern. 439. Hill. 1686. Kildare (Earl of) v. Eustace.

21. Custom of a copyhold manor as to descent. Vern. 489. Mich.

1687. Edwin v. Thomas.

22. Agreement for so many load of coals at so much per load; plaintiff suggested, that defendant had made his waggons of a larger size to defraud him. Issue directed as to over size of the waggons. 2 Vern. R. 462. Mich. 1704. Brandlin v. Owen.

23. Whether a bond was executed or not? Chan. Prec. 238.

Hill. 1704. Acton v. Acton.

24. An issue was directed in a matter where plaintiss had a proper action at law, and the plaintiss under no impediment in respect of bringing such action. 2 Vern. R. 503. Tr. 1705. Gibbert v. Emerton; per Wright K.—But an issue resusce to be directed for the same reason, in the Case of Peers v. Bellamy, cited in the Case above. 2 Vern. R. 504.

25. Issue at law directed on a rehearing of exceptions taken to a decree made by commissioners of charitable uses, after that decree had been twice confirmed, 2 Vern. R. 507. pl. 456. Trin. 1705. Corpus Christi College v. Naunton Parish in Gloucester-

thire.

26. An issue was directed, whether J. S. did execute marriage articles in the very words of the counter-part produced; it was objected, that the issue was too narrow, and that it ought to be, whether he executed any, and what articles? Decree was reversed. But there was another point; ideo quære. MSS. Tab. tit. Issue, cites 28th Feb. 1707. Kelley v. Bellew.

27. It

27. It is improper to direct an issue, whether there be a trust or no, especially where it appears by implication from the nature of the case. MSS. Tab. tit. Issue, cites 8 March 1724. Eyre v. Burk.

28. Whether money given for the benefit of his children by a perfon much in debt fix hours before his death was fraudulent or not? Sel. Ch. Ca. in Ld. King's Time, 77. July 14, 1725. Duffin v. Furness.

29. Bill brought to have a trial at law for the bounds of a manor. Mr. Talbot informed the Court, that in the Case of the BISHOP OF DURHAM, which was parallel to this, it was ordered, that each side should give a note to the other of what each claimed as their bounds; and if the jury find bounds different from the note given from either side, that those different boundaries should be indersed on the postea; and so it was ordered here; only it being a [268] trial at bar it was to be indersed on the habeas corpus (same order made Nov. 4, 1726, between Hughes and Grames) Sel. Cases in Chan. in Ld. King's Time, 60, 61. Mich. 12 Geo. 1. Lethulier v. Castlemain.

30. Whether by the general words of a deed the lands in question were intended to pass? 2 Wms's Rep. 563. Hill. 1729. Coker varewell.

The End of the TWELFTH VOLUME.

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